Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the application of the Natural Gas Act of 1938 ("NGA") to gas transportation from the Outer Continental Shelf ("OCS"), the largest single source of natural gas production in this country. Under the NGA, the commencement and cessation of the transportation of gas in interstate commerce by natural gas pipelines is subject to the approval of the Federal Energy Regulation Commission ("FERC" or "Commission") as in the public interest through the grant of "certificate" or "abandonment" authorization. This regulatory jurisdiction, and the FERC's regulation of interstate transportation rates, protects the public against the monopoly power of interstate pipelines.

The NGA distinguishes between the narrowly confined local production and gathering of natural gas, which Congress intended to be subject to state jurisdiction, and the transportation of gas in interstate commerce, which is subject to FERC's jurisdiction. On the OCS, where there is no state jurisdiction, producers have invested billions of dollars and connected their producing properties to extensive offshore pipeline systems that were certificated by the FERC as jurisdictional interstate transportation facilities. Producers thereby relied on FERC's ongoing regulation of these pipeline systems under the NGA for protection against the exercise of monopoly power.

The questions presented in this case are:

1. Whether the reclassification of hundreds of miles of jurisdictional natural gas transportation pipeline systems as nonjurisdictional gathering facilities under the new "central-aggregation-point" test applied by the FERC and upheld by the D.C. Circuit is inconsistent with this Court's precedents that the "gathering" exemption from the Commission's jurisdiction over interstate transportation under the NGA must be strictly construed and

"narrowly confined to the physical acts of . . . preparing [gas] for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963).

2. Whether the D.C. Circuit erred in concluding, in direct conflict with the Fifth Circuit, that offshore natural gas pipeline systems previously certificated by the FERC under the Natural Gas Act as jurisdictional transportation facilities in the public convenience and necessity may be reclassified by the Commission as exempt gathering facilities and abandoned by transfer to a nonjurisdictional entity without a finding by the Commission that the public convenience or necessity permits such abandonment.

RULE 29.6 STATEMENT

The petitioners are BP America Production Company, BP Energy Company, Chevron U.S.A. Inc., Exxon Mobil Corporation, Shell Offshore Inc. and Texaco Natural Gas Inc.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner BP America Production Company states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

BP plc
BP America Inc.
BP Corporation North America Inc.
BP Company North America Inc.

BP Energy Company states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

BP plc
BP America Inc.
BP Corporation North America Inc.
BP Company North America Inc.
BP America Production Company

Chevron U.S.A. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

ChevronTexaco Corporation
ChevronTexaco Overseas Petroleum Inc.
Chevron Asiatic Limited
Texaco Inc.
TEPI Holdings Inc.
Texaco Exploration and Production Inc.
Chevron U.S.A. Holdings Inc.
Chevron U.S.A. Inc.

Exxon Mobil Corporation states that there are no parent companies or publicly held companies that have a 10% or greater ownership interest in Exxon Mobil Corporation.

Shell Offshore Inc. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

SOI Finance Inc.
Shell U.S. E&P Investments Inc.
Shell Oil Company
Shell Petroleum Inc.
Shell Petroleum N.V.
Royal Dutch Petroleum Company
The "Shell" Transport and Trading Company, p.l.c.

Texaco Natural Gas Inc. states that the following are its parent companies and any publicly held company that has a 10% or greater ownership interest in the company:

ChevronTexaco Corporation
ChevronTexaco Overseas Petroleum Inc.
Chevron Asiatic Limited
Texaco Inc.
TEPI Holdings Inc.
Texaco Exploration and Production Inc.
Chevron U.S.A. Holdings Inc.
Chevron U.S.A. Inc.

PARTIES IN THE COURT BELOW

The following parties participated in the appeals of the orders of the Federal Energy Regulatory Commission before the United States Court of Appeals for the District of Columbia Circuit:

Amerada Hess Corporation
Amoco Energy Trading Corporation
Amoco Production Company
Anadarko Petroleum Corporation
Baltimore Gas and Electric Company
Boston Gas Company
BP America Production Company
BP Energy Company
Brooklyn Union Gas Company
Burlington Resources Oil & Gas Company L. P.
Chevron U.S.A. Inc
Colonial Gas Company
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing and Trade
Energy North Natural Gas, Inc.
Essex Gas Company
Exxon Mobil Corporation
Forest Oil Corporation
KeySpan Gas East Corporation
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
Shell Offshore, Inc.
Sunoco, Inc.
Texaco Exploration and Production Inc.
Texaco Natural Gas Inc.

The Houston Exploration Company
TotalFinaElf E&P U.S.A.
Transcontinental Gas Pipe Line Corporation
Williams Gas Processing—Gulf Coast Company, L.P.

The following additional parties participated in the administrative proceedings before the Federal Energy Regulatory Commission:

a. Docket Nos. CP96-206-000 and CP96-207-000

Amerada Hess Corporation
Amoco Energy Trading Corporation
Amoco Production Company, *et al.*
Anadarko Petroleum Corporation
ANR Pipeline Company
Aquila Energy Marketing Corporation
Atlanta Gas Light Company
Ashland Exploration, Inc.
Baltimore Gas & Electric Company
Blue Dolphin Exploration Company
Brooklyn Union Gas Co.
Chevron U.S.A., Inc.
City of Richmond, Virginia
CNG Energy Services Corporation
Coastal Eagle Point Oil Company
Columbia Gulf Transmission Company
Commonwealth Gas Services, Inc.
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Delphi Gas Pipeline Corporation
Dominion Exploration and Production, Inc.
(Formerly CNG Producing Company)
Dominion Transmission, Inc.
Enron Capital & Trade Resources Corporation
Enron Louisiana Energy Company

East Ohio Gas Company
Exxon Corporation
Fina Natural Gas Company
Florida Gas Transmission Company
Gasdel Pipeline System, Inc.
GPM Gas Corporation
High Island Offshore System
Independent Petroleum Association of America
John H. Young, Inc.
Koch Gateway Pipeline Company
Leviathan Gas Pipeline Company
Liquid Energy Corporation
Long Island Lighting Company
Louisiana Land & Exploration Company
Market Hub Partners, L.P.
Mobil Natural Gas Inc.
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Natural Gas Clearinghouse
Natural Gas Pipeline Company of America
New Jersey Natural Gas Company
Niagara Mohawk Power Corporation
NorAm Gas Transmission
North American Resources Company
North Carolina Natural Gas Corporation
North Jersey Energy Associates
Northeast Energy Associates
Northern Natural Gas Company
NUI Corporation
Owens-Corning Fiberglass Corporation
OXY USA Inc.
PanEnergy Gas Services, Inc.
PanEnergy Field Services, Inc.
PECO Energy Company
Penn Fuel Gas, Inc.
Pennzoil Exploration and Production Company

PG Energy Inc.
Philadelphia Gas Works
Phillips Gas Marketing Company
Phillips Petroleum Company
Piedmont Natural Gas Company
Pogo Producing Company
Process Gas Consumers Group
Producer-Marketer Transportation Group[1]
Public Service Commission of the State of New York
Public Service Company of North Carolina, Inc.
Public Service Electric & Gas Company
Rochester Gas & Electric Corporation
Sea Robin Pipeline Company
Seagull Marketing Services, Inc.
Shell Offshore, Inc.
Shell West E&P Inc.
South Carolina Pipeline Company
South Jersey Gas Company
Southern Company Services, Inc.
Southern Natural Gas Company
Star Enterprise
Sun Company, Inc.
Superior Natural Gas Corporation
Tejas Power Corporation
Tenneco Energy Inc.
Texaco Natural Gas Inc.
Texas Eastern Transmission Corporation
Transco Municipal Group
Transcontinental Gas Pipeline Co.
Trunkline Gas Company
UGI Utilities, Inc.

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[1] The Producer-Marketer Group comprises Independent Oil & Gas Association of West Virginia, KCS Energy Marketing, Inc. Richardson Products Co., Sid Richardson Oil & Gasoline, Inc. and Valero Natural Gas Company.

UMC Petroleum Corporation
Union Oil Company of California
Union Pacific Fuels, Inc.
U-T Offshore System
Valero Gas Marketing, L.P.
Valero Transmission, L.P.
Vaster Gas Marketing, Inc.
Vastar Resources, Inc.
Virginia Natural Gas, Inc.
Walter Oil & Gas Corporation
Washington Gas Light Company
Williams Gas Processing—Gulf Coast Company, L.P

b. Docket Nos. CP01-32-000 and CP01-34-000

Amerada Hess Corporation
Amoco Production Company
Anadarko Petroleum Corporation
Atlanta Gas Light Company
Atmos Energy Corporation
Baltimore Gas & Electric Company
Boston Gas Company
BP America Production Company
BP Energy Company
Burlington Resources Oil & Gas Company
Chevron U.S.A. Inc.
Columbia Gulf Transmission Company
Conoco Inc.
Conoco Gas and Power Marketing
Consolidated Edison Company of New York
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
El Paso Energy Corporation
Enron North America Corporation
Enterprise Oil Gulf of Mexico Inc.

Equiva Services
Exxon Mobil Corporation
Forest Oil Corporation
Houston Exploration Company
Kerr-McGee Oil & Gas Corporation
KeySpan Energy
Municipal Gas Authority of Georgia
New York Public Service Commission
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
Pancanadian Energy Services, Inc.
PECO Energy Company
Phillips Petroleum Company
Piedmont Natural Gas Company, Inc.
Public Service Electric & Gas Company
Shell Offshore, Inc.
Sunoco, Inc.
Superior Natural Gas Corporation
Tennessee Gas Pipeline Company
Texaco Group Inc.
Texaco Natural Gas Inc.
TotalFinaElf E&P U.S.A., Inc.
Transcontinental Gas Pipeline Corporation
United Cities Gas Company
Virginia Natural Gas Company
Washington Gas Light Company
Williams Companies Inc.
Williams Gas Processing—Gulf Coast Company, L.P.

c. Docket Nos. CP01-103-000 and CP01-104-000

Amerada Hess Corporation
Amoco Production Company
Atlanta Gas Light Company
Baltimore Gas & Electric Company

Boston Gas Company
BP America Production Company
BP Energy Company
Brooklyn Union Gas Company dba Keyspan Energy Delivery New York
Chevron, U.S.A. Inc.
Colonial Gas Company
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing & Trade
El Paso Corporation
EnergyNorth Natural Gas, Inc.
Essex Gas
Exxon Mobil Corporation
Forest Oil Corporation
Houston Exploration Company
KeySpan Gas East Corporation dba KeySpan Energy Delivery Long Island
Motiva Enterprises LLC
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
PECO Energy Company
Piedmont Natural Gas Company, Inc.
Southern Company Services, Inc.
Sunoco, Inc.
Superior Natural Gas Corporation
Texaco Natural Gas Inc.
Transco Municipal Group
United Cites Gas Company
Walter Oil & Gas Corporation
Washington Gas Light Company
Williams Gas Processing—Gulf Coast Company, L.P.

d. Docket Nos. CP01-368-000 and CP01-369-000

Amerada Hess Corporation
Amoco Production Company
Atlanta Gas Light Company
BP Energy Company
Burlington Resources Oil & Gas Company, L.P.
Chevron U.S.A. Inc.
City of Richmond, Virginia
Conoco Inc.
Consolidated Edison Company of New York, Inc.
Delmarva Power & Light Company
Devon Energy Corporation
Dominion Exploration & Production, Inc.
Dynegy Marketing & Trade
Enron North American Corporation
Exxon Mobil Corporation
Forest Oil Corporation
Houston Exploration Company
KeySpan Delivery Companies
Municipal Gas Authority of Georgia
National Fuel Gas Distribution Corporation
Newfield Exploration Company
Occidental Energy Marketing, Inc.
Ocean Energy, Inc.
PECO Energy Company
Philadelphia Gas Works
Phillips Gas Marketing Company
Phillips Petroleum Company
Piedmont Natural Gas Company, Inc.
Process Gas Consumers Group
Public Service Commission of the State of New York
Public Service Company of North Carolina
Shell Offshore, Inc.
Southern Company Services, Inc.
Superior Natural Gas Company

Texaco Natural Gas Inc.
TotalFinaElf E&P U.S.A. Inc.
Transco Municipal Group
United Cities Gas Company
Virginia Natural Gas Company
Walter Oil & Gas Corporation
Washington Gas Light Company
Williams Gas Processing—Gulf Coast Company, L.P.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners BP America Production Company, BP Energy Company, Chevron U.S.A. Inc., Exxon Mobil Corporation, Shell Offshore Inc. and Texaco Natural Gas Inc. ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at *Williams Gas Processing-Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) and is reproduced at Petition Appendix (Pet. App. 1a). A previously submitted Petition For A Writ Of Certiorari concerning the D.C. Circuit's opinion is pending before this Court. *Producer Coalition v. FERC*, No. 03-147 (U.S. Sup. Ct.).

Substantially similar issues as presented here also have been raised by previously submitted Petitions For A Writ Of Certiorari, *ExxonMobil Gas Mktg. Co. v. FERC*, No. 02-1265 (U.S. Sup. Ct.), and *Producer Coalition v. FERC*, No. 02-1215 (U.S. Sup. Ct.), arising out of a prior decision of the D.C. Circuit. This decision is published at *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*Exxon Mobil*").

Due to the close relationship between the D.C. Circuit's opinions in this case and *Exxon Mobil*, in tandem review of the Petitions filed with respect to each case is respectfully requested.

The orders of the FERC under review in this proceeding are published as indicated below and are reproduced at Petition Appendix as noted:

1. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP96-206-000 and CP96-207-000, 76 F.E.R.C. (CCH) ¶ 61,317 (September 25, 1996), Pet. App. 21a;

2. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP96-206-001 and CP96-207-001, 95 F.E.R.C. (CCH) ¶ 61,396 (June 14, 2001), Pet. App. 45a;
3. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-103-000 and CP01-104-000, 96 F.E.R.C. (CCH) ¶ 61,118 (July 25, 2001), Pet. App. 60a;
4. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-103-001 and CP01-104-001, 97 F.E.R.C. (CCH) ¶ 61,300 (December 19, 2001), Pet. App. 98a;
5. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-32-000 and CP01-34-000, 96 F.E.R.C. (CCH) ¶ 61,115 (July 25, 2001), Pet. App. 127a;
6. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-32-001 and CP01-34-001, 97 F.E.R.C. (CCH) ¶ 61,296 (December 19, 2001), Pet. App. 168a;
7. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-368-000 and CP01-369-000, 96 F.E.R.C. (CCH) ¶ 61,246 (August 31, 2001), Pet. App. 198a;
8. *Transcontinental Gas Pipe Line Corp., Williams Gas Processing—Gulf Coast Company, L.P.*, Docket Nos. CP01-368-001 and CP01-369-001, 97 F.E.R.C. (CCH) ¶ 61,298 (December 19, 2001), Pet. App. 235a.

STATEMENT OF JURISDICTION

The Court of Appeals had jurisdiction under Section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b). The judgment of the Court of Appeals was entered on June 20, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes at issue in this case are Sections 1(b), 4 and 7 of the NGA, 15 U.S.C. §§ 717(b), 717c, and 717f, and are reprinted at Pet. App. 264a-273a.

STATEMENT OF THE CASE

In this case, the D.C. Circuit upheld FERC decisions that reclassified hundreds of miles of jurisdictional natural gas transportation pipelines located on the OCS as gathering facilities exempt from the FERC's jurisdiction under Section 1(b) of the NGA. The result of the reclassification, and the consequent abandonment of facilities and services from interstate service, is to remove FERC authority under the NGA to regulate the rates and terms and conditions of service imposed by pipeline monopolies on the OCS.

The D.C. Circuit's decision is at odds with prior precedent of this Court that strictly construes the production and gathering exemption from FERC jurisdiction under Section 1(b) of the NGA as "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 90 (1963) ("*Northern Natural*").

The decision below also squarely conflicts with the Fifth Circuit's holding in *Pacific Gas and Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997) ("*Pacific Gas and Electric Co.*"). In the proceedings below, the FERC permitted the abandonment of the previously certificated facilities by approving the transfer of the reclassified facilities to a nonjurisdictional affiliate without the required hearing and finding under Section 7(b) of the NGA that the public convenience or necessity permits the abandonment. The D.C. Circuit affirmed, holding that FERC has no discretion to examine whether or not an abandonment of certificated transportation systems that have been reclassified as gathering facilities is in the public interest. 331 F.3d at 1022,

Pet. App. 18a-19a. In direct contrast, in *Pacific Gas and Electric Co.*, the Fifth Circuit held that FERC may *not* authorize abandonment of reclassified facilities "unless it finds that the 'future public convenience and necessity permit such abandonment.'" 106 F.3d at 1197. On this important issue, there is a direct conflict between the two Courts of Appeal that most often consider cases involving the application of the NGA on the OCS.

The failure of the FERC and the D.C. Circuit to follow the longstanding precedents of this Court and the Fifth Circuit's decision in *Pacific Gas and Electric Co.* has improperly disrupted "a highly complex and long enduring regulatory regime implicating considerable reliance interests of . . . participants in the regulatory process." *California v. FERC*, 495 U.S. 490, 500 (1990). This Court's immediate review is necessary to resolve the conflicts between the D.C. Circuit's decision below and the precedents of this Court and the Fifth Circuit, to prevent the destruction of producers' significant reliance interests and to restore certainty over the extent of FERC's jurisdiction and regulatory oversight over natural gas transported from the OCS.

A. The NGA Provisions.

Congress enacted the NGA to create a comprehensive regulatory scheme of dual federal and state authority, with FERC regulation broadly supplementing the narrow areas of local concern that had been recognized as properly subject to state authority. *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 632 (1972). Section 1(b) of the NGA provides FERC with jurisdiction over "the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . . and . . . natural-gas companies engaged in such transportation or sale." As relevant here, Section 1(b) excludes from the primary grant of FERC jurisdiction and preserves for the exercise of state authority "the production or gathering of natural gas." 15 U.S.C. § 717(b).

Section 4 of the NGA provides for rate regulation of activities subject to the FERC's jurisdiction. It mandates that "[a]ll rates and charges made, demanded, or received by any natural gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission . . . shall be just and reasonable." 15 U.S.C. § 717c(a).

Section 7 of the NGA grants FERC authority over both the commencement and the cessation of jurisdictional activities. Section 7(c) provides that no natural gas company "shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof" without "a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." *Id.* § 717f(c). Section 7(b) of the Act provides that no natural gas company shall "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing," and without "a finding by the Commission . . . that the present or future public convenience or necessity permits such abandonment." *Id.* § 717f(b). Thus, a natural gas company may not commence transmission of natural gas in interstate commerce unless and until the FERC makes a finding that such action serves the "public convenience and necessity," nor may the company cease such activity absent a similar finding.

B. Factual Background.

1. Producer Reliance on the Existing Regulatory Scheme.

The OCS in the Gulf of Mexico is the largest single domestic source of current natural gas production, and will be an important source of new development and production necessary to serve the future energy requirements of this

country. *See Gas Pipeline Facilities And Services On The Outer Continental Shelf*, 74 F.E.R.C. (CCH) ¶ 61,222, 61,752 n.5 (1996) ("*OCS Policy Statement*"). As the FERC has recognized, natural gas production on the OCS has been developed, to a large extent, by producers in "reliance on the existing regulatory scheme for access to reasonably priced transportation and protection against market power by interstate pipelines." *Id.* at 61,757.

Most of the pipeline facilities at issue in the proceedings below were previously certificated by the FERC under Section 7(c) of the NGA as jurisdictional transportation facilities. 331 F.3d at 1015, Pet. App. 5a-7a. Consequently, such facilities and the transportation services provided by the facilities were subject to FERC's regulatory oversight, including rate regulation pursuant to Section 4 of the NGA.

Certification of the facilities pursuant to Section 7(c) dedicates the pipeline facilities and services provided by the facilities to the interstate market and "create[s] a federal obligation to serve the interstate market until abandonment authorization ha[s] been obtained" pursuant to Section 7(b) of the NGA. *California v. Southland Royalty Co.*, 436 U.S. 519, 526 (1978). Under Section 7(b), "the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interests 'will in no way be disserved' by abandonment." *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d 1325, 1328 (D.C. Cir. 1973), *quoting Michigan Consolidated Gas Co. v. FPC*, 283 F.2d 204, 214 (D.C. Cir. 1960).

2. The 1996 Abandonment Application And Petition.

On February 21, 1996, Transcontinental Gas Pipe Line Corporation ("Transco") filed an application at FERC for an order authorizing the abandonment of all of its offshore facilities in the Gulf of Mexico, as well as various onshore facilities, by sale to its affiliate, Williams Gas Processing—Gulf Coast Company, L.P., ("WGP"). Concurrent with

Transco's request to abandon the offshore pipelines to WGP, WGP filed a petition requesting a declaratory order that the facilities are nonjurisdictional gathering facilities exempt from the Commission's jurisdiction under Section 1(b) of the NGA. Transco and WGP thereby sought to eliminate FERC's regulatory authority and rate regulation over the 3,100 miles of pipeline systems at issue. 331 F.3d at 1015, Pet. App. 5a-7a. These extensive facilities are depicted on the map set forth at Pet. App. 274a.

On September 25, 1996, the Commission dismissed Transco's 1996 abandonment application and petition. *Transcontinental Gas Pipe Line Corp.*, 76 F.E.R.C. (CCH) ¶ 61,317 (1996), Pet. App. 21a, *reh'g denied*, 95 F.E.R.C. (CCH) ¶ 61,396 (2001), Pet. App. 45a. The Commission stated that the "dismissal is without prejudice, however, to Transco's and WGP's filing another proposal requesting that the Commission consider discrete portions of the facilities which were the subject of the instant proceedings to be gathering . . . ." *Id.* at 62,543, Pet. App. 34a.

3. Subsequent Abandonment Applications And Petitions.

On November 20, 2000, Transco filed an abandonment application requesting authority to transfer Transco's North Padre Island ("NPI") and Central Texas ("CT") facilities to WGP. Concurrently, WGP filed a petition requesting a declaratory order disavowing jurisdiction over the NPI and CT facilities. The petition and application were approved without modification. *Transcontinental Gas Pipe Line Corp.*, 96 F.E.R.C. (CCH) ¶ 61,115 (2001), Pet. App. 127a, *reh'g denied*, 97 F.E.R.C. (CCH) ¶ 61,296 (2001), Pet. App. 168a. Maps depicting the NPI and CT facilities declared to constitute gathering and abandoned as proposed by Transco and WGP are set forth at Pet. App. 275a and 276a, respectively.

On March 12, 2001, Transco filed an abandonment application requesting authority to abandon by transfer to WGP,

Transco's North High Island ("NHI") and West Cameron ("WC") facilities. Concurrently, WGP filed a petition requesting a declaratory order disavowing jurisdiction over the NHI and WC facilities. This petition and application were approved in part as to the NHI facilities and denied as to the WC facilities. A map depicting the NHI and WC facilities proposed by Transco and WGP to constitute gathering is set forth at Pet. App. 277a. The map also identifies the point of demarcation at NHI Block 10 between the upstream facilities declared by FERC to constitute gathering and the downstream facilities that remain transmission. *Transcontinental Gas Pipe Line Corp.*, 96 F.E.R.C. (CCH) ¶ 61,118 (2001), Pet. App. 60a, *reh'g denied*, 97 F.E.R.C. (CCH) ¶ 61,300 (2001), Pet. App. 98a.

Finally, on May 18, 2001, Transco filed an abandonment application requesting authority to abandon by transfer to WGP Transco's Central Louisiana ("CL") facilities. Concurrently, WGP filed a petition requesting a declaratory order disavowing jurisdiction over the CL facilities. This petition and application were approved in part. *Transcontinental Gas Pipe Line Corp.*, 96 F.E.R.C. (CCH) ¶ 61,246 (2001), Pet. App. 198a, *reh'g denied*, 97 F.E.R.C. (CCH) ¶ 61,298 (2001), Pet. App. 235a. A map depicting the CL facilities proposed by Transco and WGP to be reclassified as gathering is set forth at Pet. App. 278a. The map also identifies the point of demarcation at Vermilion Block 67 between the upstream facilities in the OCS declared by FERC to constitute gathering and the downstream facilities that remain transmission.

In each of the Commission's orders, the Commission purported to apply its primary function test[1] and selected as a

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[1] *Transcontinental*, 97 F.E.R.C. at 62,384, Pet. App. 181a-183a; 97 F.E.R.C. at 62,398 Pet. App. 248a-251a; 97 F.E.R.C. at 62,411, Pet. App. 111a-114a. As explained by the D.C. Circuit, "since 1983, FERC has used a multi-factor "primary function test" to determine" whether onshore facilities are "devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has

demarcation point between upstream gathering and downstream transmission the point on each offshore lateral system where all or essentially all offshore facilities had converged at a central point offshore. Specifically, the Commission selected the following points on each of the offshore laterals:

NPI—North Padre Island Block 956 [2]
CT—Brazos Block 538 [3]
NHI—North High Island Block 10 [4]
CL—Vermilion Block 67.[5]

As a result, about 466 miles of offshore pipeline systems upstream from the demarcation points were reclassified as nonjurisdictional gathering facilities.[6]

In reaching these conclusions, the Commission rejected the argument that Transco had failed to demonstrate, as required by Commission policy, changed circumstances that would warrant a departure from the Commission's prior determi-

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been collected-interstate transportation." 331 F.3d at 1014, Pet. App. 3a, *citing Conoco Inc. v. FERC*, 90 F.3d 536, 543 (D.C. Cir. 1996). FERC later "modified" the primary-function-test to apply on the OCS and subsequently "reformulated" the primary function test to feature the central-aggregation-point test for offshore systems. *Id.*

[2] *Transcontinental*, 96 F.E.R.C. at 61,440-41, Pet. App. 157a-162a. *See* Map at Pet. App. 275a.

[3] *Transcontinental*, 96 F.E.R.C. at 61,440-41, Pet. App. 157a-162a. *See* Map at Pet. App. 276a.

[4] *Transcontinental*, 96 F.E.R.C. at 61,458-59, Pet. App. 85a-90a. *See* Map at Pet. App. 277a.

[5] *Transcontinental*, 96 F.E.R.C. at 61,976-77, Pet. App. 224a-230a. *See* Map at Pet. App. 278a.

[6] The following pipeline systems were reclassified as gathering: 22 miles of pipeline upstream from NPI Block 956 (*Transcontinental*, 96 F.E.R.C. at 61,431); 270 miles of pipeline in CT upstream from Brazos Block 538 (*Id.*); 111 miles of pipeline upstream from NHI Block 10 (*Transcontinental*, 96 F.E.R.C. at 61,458) and 63 miles of offshore pipeline in CL upstream of Vermilion Block 67 (*Transcontinental*, 96 F.E.R.C. at 61,976-77). The Commission determined there was no central-aggregation-point on the WC system and, accordingly, concluded that the entirety of the system is transmission. *Transcontinental*, 96 F.E.R.C. at 61,459-60, Pet. App. 87a-92a.

nation that the primary function of the subject facilities was transmission. In the Commission's view, Transco's restructuring under the FERC's Order No. 636 [7] provided a change in circumstances that warranted a reclassification of the pipeline facilities as nonjurisdictional gathering facilities.[8] The Commission acknowledged, however, that the subject facilities were previously certificated as jurisdictional facilities pursuant to Section 7(c) of the NGA and that Transco's business purpose was the interstate transportation of gas. The Commission further concluded that once it had found these pipeline systems to be gathering facilities, it had no discretion to reject Transco's application to abandon the facilities by sale to its affiliate or to regulate the rates or terms and conditions over the reclassified and abandoned pipeline systems.[9]

4. The D.C. Circuit's Decision Below.

On review, the D.C. Circuit upheld FERC's determinations. The court held that "petitioners fail to demonstrate that FERC's choices are 'unreasonable and its chosen line[s] of demarcation [are] not within' a 'zone of reasonableness' as

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[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1991-1996] (CCH) ¶ 30,939 (1992). In general, FERC Order No. 636 encouraged pipeline systems to restructure operations by "unbundling" functions included within the traditional multi-function "merchant" role of purchasing, gathering, transporting and re-selling natural gas. Order No. 636 thereby prompted pipelines to attempt to distinguish between, *i.e.* to unbundle, jurisdictional transmission facilities and gathering facilities that had been traditionally bundled as part of pipelines' merchant function. *See* 331 F.3d at 1020, Pet. App. 14a-16a.

[8] *Transcontinental*, 97 F.E.R.C. at 62,383, Pet. App. 178a-181a; 97 F.E.R.C. at 62,410, Pet. App. 108a-111a; 97 F.E.R.C. at 62,397, Pet. App. 245a-248a.

[9] *Transcontinental*, 96 F.E.R.C. at 61,434, 61,442 Pet. App. 140a-143a, 162a-164a; 96 F.E.R.C. at 61,454, 61,460-61,461, Pet. App. 74a-76a, 90a-95a; 96 F.E.R.C. at 61,971, 61,977-61978, Pet. App. 211a-213a, 227a-233a.

distinct from the question of whether the line[s] [are] 'precisely right.'" [10] The D.C. Circuit noted that FERC had "determined that each system featured a central aggregation point demarcating gathering and transmission functions" (331 F.3d at 1015, Pet. App. 6a); that *Exxon Mobil* had upheld FERC's central-aggregation-point test for demarcating gathering and transmission functions (331 F.3d at 1018, Pet. App. 10a-12a); and determined that petitioners had not carried their burden under *Exxon Mobil* to "demonstrate that lines drawn [by FERC] . . . are patently unreasonable, having no relationship to the underlying regulatory problem" (331 F.3d at 1018, Pet. App. 11a).

At no point did the D.C. Circuit justify the radical expansion of the gathering exemption under Section 1(b) of the NGA beyond the narrow confines of the Supreme Court's long-standing definition in *Northern Natural*. Nor did the D.C. Circuit recognize that the failure to follow *Northern Natural* would disrupt the well-entrenched regulatory regime that had developed on the OCS and thereby would threaten to destroy producers' significant property rights and reliance interests. Instead, the D.C. Circuit simply referenced regulatory changes as explaining Transco's efforts to reclassify and abandon pipeline facilities that had been previously certificated as transmission facilities without explaining or even acknowledging the departure from *Northern Natural*. 331 F.3d at 1020, Pet. App. 14a-16a.[11]

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[10] 331 F.3d at 1013 (*quoting Exxon Mobil*, 297 F.3d at 1084) Pet. App. 2a-3a.

[11] The Commission asserted that abandonment was consistent with its unbundling policies of Order No. 636 and "in the long run" should promote competition. *Transcontinental*, 96 F.E.R.C. at 61,434-35, Pet. App. 140a-145a; *reh'g denied*, 97 F.E.R.C. at 62,381, Pet. App. 173a-175a; 96 F.E.R.C. at 61,971, Pet. App. 211a-213a, *reh'g denied*, 97 F.E.R.C. at 62,395, Pet. App. 240a-243a; 96 F.E.R.C. at 61,454, Pet. App. 74a-76a, *reh'g denied*, 97 F.E.R.C. at 62,408, Pet. App. 103a-106a.

Finally, the D.C. Circuit rejected Petitioners' contention that even if the facilities are properly classified as gathering, the NGA required FERC to make a public interest finding before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate pursuant to Section 7(b) of the NGA. *See* 331 F.3d at 1021, Pet. App. 16a-18a. Although the D.C. Circuit acknowledged the Fifth Circuit's contrary holding in *Pacific Gas & Electric Co. v. FERC*, the D.C. Circuit held that FERC had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering:

> We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

331 F.3d at 1022, Pet. App. 19a.

The D.C. Circuit's decision below was "instructed" (331 F.3d at 1013, Pet. App. 2a) by a D.C. Circuit decision issued by another panel in *Exxon Mobil*. *In Exxon Mobil*, a divided court upheld FERC decisions concerning the Sea Robin offshore pipeline system that, like the FERC decisions in this case, reclassified hundreds of miles of pipelines from jurisdictional transportation facilities to nonjurisdictional gathering facilities. Judge Edwards issued a strong dissenting opinion in *Exxon Mobil*, describing the court's validation of FERC's orders as reclassifying a "massive pipeline complex (438 miles overall)" (297 F.3d at 1089) as gathering and "unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*" 297 F.3d. at 1093.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has decided that the FERC may interpret and apply the NGA in a manner that is in direct conflict with

precedent of this Court and the Court of Appeals for the Fifth Circuit. Following a divided panel's majority decision in *Exxon Mobil*, the D.C. Circuit below affirmed FERC's use of a "central-aggregation-point" test for distinguishing between facilities that are used for "the transportation of natural gas in interstate commerce," which are subject to FERC's jurisdiction, and those used for "gathering," which are not. In this case, the result of the application of the "central-aggregation-point" test is that hundreds of miles of pipeline systems previously certificated under Section 7(c) as facilities constructed or operated for the jurisdictional transportation of natural gas—and therefore subject to the just and reasonable rate protections under Section 4—have been reclassified as nonjurisdictional gathering facilities. Consequently, offshore producers of natural gas have been directly exposed to the monopoly power of interstate pipelines, the precise problem that the NGA was enacted to address. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944).

The D.C. Circuit's decision below also conflicts with the Fifth Circuit's decision in *Pacific Gas and Electric Co.* as the court itself acknowledged, and also contradicts the requirements of Section 7(b) of the NGA. The decision below recognized that the reclassified pipeline facilities previously had been certificated as transportation facilities pursuant to Section 7(c) of the NGA (331 F.3d at 1015, Pet. App. 5a-7a), but the Court refused to require—or even allow—FERC to make a public interest finding pursuant to Section 7(b) before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate. 331 F.3d at 1022, Pet. App. 18a-19a. In *Pacific Gas and Electric Co.*, on direct contrast, the Fifth Circuit held that FERC *must* act as required by Section 7(b) to ensure the public convenience and necessity with respect to the abandonment of certificated facilities that have been reclassified as gathering facilities.

This Court's resolution of the proper application of the NGA to offshore pipelines is of extraordinary importance.

The "central-aggregation-point" test affirmed by the D.C. Circuit in this case and in *Exxon Mobil* dramatically inflates the scope of the production and gathering exemption under Section 1(b) of the NGA beyond any resemblance to the standard set forth by *Northern Natural* and other precedents of this Court. Application of the "central-aggregation-point" to other pipeline systems on the OCS would result in the reclassification of other OCS pipeline systems from NGA-certificated transportation facilities to nonjurisdictional gathering facilities, and the subsequent abandonment of such pipeline systems and avoidance of NGA regulation by transfer of the facilities to a nonjurisdictional affiliate. Under such circumstances, unless FERC acts to ensure the public convenience and necessity pursuant to Section 7(b) of the NGA, as *required* by the Fifth Circuit in *Pacific Gas and Electric Co.*, but *foreclosed* by the D.C. Circuit in this case, producers of natural gas on the OCS will be exposed to the market power of interstate pipelines and their affiliates and to their demands for monopolistic rates.

The OCS is critical to meeting this nation's future energy requirements. In 1996, the FERC recognized that "[t]he Gulf of Mexico is the largest single domestic source of natural gas production, currently representing 27 percent of the lower 48 states' total dry gas production and 17 percent of proven reserves." *OCS Statement of Policy*, 74 F.E.R.C. at 61,752 n.5. By failing to adhere to the strict requirements of the NGA as construed by this Court, the decision below and *Exxon Mobil* have put at risk billions of dollars invested by producers in reliance on the continued regulatory oversight and rate regulation by the FERC over pipeline facilities on the OCS. *See California v. FERC*, 495 U.S. at 499. The importance of the OCS to the nation's energy needs, the significant disruption to further development of the OCS threatened under the D.C. Circuit's decisions below and in *Exxon Mobil*, and the conflicts that exist between the D.C. Circuit's decisions and precedents of this Court and the Fifth Circuit all serve to

underscore the critical need for this Court's immediate review.

I. THE D.C. CIRCUIT'S CONSTRUCTION OF THE GATHERING EXEMPTION FROM FERC'S JURISDICTION UNDER THE NGA CONFLICTS WITH PRECEDENTS OF THIS COURT.

A. The Gathering Exemption Under Section 1(b) Of The NGA Is Limited To Local Activities That Are Preparatory For The First Stages Of Natural Gas Distribution.

Congress enacted the NGA to create a comprehensive regulatory scheme of dual federal and state authority, with FERC regulation broadly supplementing the narrow areas of local concern reserved to the states. *FPC v. Louisiana Power & Light Co.*, 406 U.S. at 632 (1972); *see also Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 511-12 (1989). Congress intended the NGA "to occupy the field in which the Supreme Court has held that the States may not act." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 185 (1983). By the same token, the exemptions from federal jurisdiction in Section 1(b) were intended to preserve areas of state authority over local matters that had been defined at the time of the NGA's enactment, *i.e.*, "to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act." *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 691 (1947). These Congressional purposes were accomplished by Section 1(b) of the NGA, which both defines matters of primary federal jurisdiction and sets forth "strictly construed" exemptions from the primary grant of federal jurisdiction. *Id.* The production and gathering exemption included in Section 1(b) reserved for the exercise of state authority only such limited control over in-state production activities that was recognized when the NGA was enacted in 1938. *See FPC v. Hope Natural Gas Co.*, 320 U.S. at 613.

At the time of the enactment of the NGA, "areas in which the States [were] constitutionally competent to act" were defined by Supreme Court holdings under the Commerce Clause. *Interstate Natural Gas Co.*, 331 U.S. at 689-90 n.13; *see also FPC v. East Ohio Gas Co.*, 338 U.S. 464, 470-71 nn.10-11 (1950). For example, the distinction in Section 1(b) between jurisdictional "sale[s] in interstate commerce of natural gas for resale" and nonjurisdictional "other . . . sale[s] of natural gas" and "the local distribution of natural gas" reflects Supreme Court cases from the early 20th century that fashioned "a bright line dividing permissible from impermissible state regulation." *Arkansas Electric Cooperative Corp. v. Arkanas Public Service Comm'n*, 461 U.S. 375, 377 (1983). Similarly, in *Interstate Natural Gas Co.*, the Court clarified that the "production and gathering" exemption under Section 1(b) of the NGA applies to the "physical production and gathering of natural gas in the interests of conservation or any other consideration of legitimate local concern." 331 U.S. at 690 (*citing Colorado Interstate Gas Co.*, 324 U.S. 581, 602-603 (1945). *See also Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954). In *Northern Natural*, the Court further specified that the production and gathering exemption under Section 1(b) is "narrowly confined to the physical acts of drawing the gas from the earth and *preparing* it for the *first* stages of distribution." 372 U.S. at 90 (emphasis added). *See also Northwest Central*, 489 U.S. at 511-12 (Section 1(b) of the NGA reserves to the states the long recognized right to regulate production in order to prevent waste and protect the correlative rights of owners).

The distinction in Section 1(b) between nonjurisdictional gathering and jurisdictional interstate transportation reflected limitations on state authority imposed by the "Dormant" Commerce Clause of the Federal Constitution. Consequently, the *Northern Natural* definition of the narrowly confined scope of the production and gathering exemption under Section 1(b) of NGA comports with pre-NGA holdings distin-

guishing between the preparatory gathering of commodities and the subsequent movement of the commodities to interstate markets. In *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926), the Court described timber that was cut and gathered at the banks of the Swamp River in Minnesota for transport over the Swamp River within Minnesota, to the larger downstream Pigeon River at the Minnesota-Ontario border, and then by railroad to Michigan.[12] Similar to the Court's later holding in *Northern Natural* concerning the scope of the gathering exemption in Section 1(b) of the NGA, in *Hughes Bros. Timber Co.* the Court held that "preparatory gathering" ceased with the collection of the cut timber on the banks of the Swamp River, and that interstate transportation commenced when the logs first entered the stream:

> It is clear that the entrepot or depot for the interstate shipment of logs was in the Swamp River. The drive in the two rivers, though under the direction of the timber company, *was not gathering the logs for subsequent interstate shipment, it was the interstate movement itself.*

Id. at 475 (emphasis added).

This Court has similarly distinguished between the gathering and interstate shipment of natural gas. In *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), the Court observed "it is now well settled" that state authority over local activity related to interstate commerce "is valid if, and only if, the local activity is not such an integral process of the interstate process, the flow of commerce, that it cannot realistically be separated from it." *Id.* at 166 (*citing Memphis Natural Gas Co. v. Stone*, 334 U.S. 80, 87 (1948) and *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)). In *Michigan-Wisconsin*, the Court struck down a Texas attempt to collect a "gathering tax" that was not "levied

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[12] The Swamp River empties into the larger Pigeon River, which forms part of the border between Minnesota and Ontario, Canada. At the mouth of the Pigeon River, the logs were picked up and taken by railroad to the Central Paper Company in Muskegon, Michigan. 272 U.S. at 475.

on the *capture or production* of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing." *Id.* at 169 (emphasis added). Just as the Court in *Hughes Bros. Timber Co.* limited "preparatory gathering" to the collection of logs on the riverbank, the Court's decision in *Michigan-Wisconsin* narrowly construed the meaning of gathering and emphasized that the "gathering tax" at issue applied to the movement of gas that did not constitute "'gathering gas' within the meaning of that term in its ordinary usage." *Id.* at 164; *see also Phillips Petroleum*, 347 U.S. at 678 n.6. The *Michigan-Wisconsin* Court reasoned that the state could not impose a tax downstream of the collection or gathering of gas in its ordinary usage because, as with the interstate transport of cut timber over the Swamp and Pigeon Rivers that followed "preparatory gathering" in *Hughes Bros. Timber Co.*, at such downstream points the "economic process is inherently unsusceptible of division into a distinct local activity . . . and a separate movement in commerce." 347 U.S. at 164. "There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the state line." 347 U.S. at 167 (*quoting United Fuel Gas Co. v. Hallanan*, 257 U.S. 277, 281 (1921)).

The *Michigan-Wisconsin* Court concluded that "as a basis for finding a separate local activity, the incidence must be a more substantial economic factor than the movement of gas from a local outlet of one owner into the connecting interstate pipeline of another." *Id.* at 169. "Such an aspect of interstate transportation cannot be 'carve[d] out from what is an entire or integral economic process.'" *Id.* at 169 (*citing Nippert v. City of Richmond*, 327 U.S. 416, 423 (1946)).

The *Michigan-Wisconsin* Court also relied upon *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), where the Court considered whether a state tax on the generation of electricity destined for consumption in interstate markets was a direct burden on interstate commerce in violation of the Commerce Clause. The Court characterized the issue as this:

"[I]s the generation of electrical energy, like manufacture or production generally, a process essentially local in character and complete in itself; or is it so linked with the transmission as to make it an inseparable part of a transaction in interstate commerce?" *Id.* at 178-79. The Court concluded that the process of generation is "essentially local" and subject to state authority whereas the subsequent transmission of electricity destined to cross state lines is interstate commerce and subject to the paramount authority of the Commerce Clause of the Federal Constitution.

As indicated by *Hughes Bros. Timber Co., Utah Gas* and *Michigan-Wisconsin,* the first collection of natural gas properly falls within the strictly construed production and gathering exemption under Section 1(b) of the NGA, but only to the extent such activity is "essentially local in character and complete in itself; [and not] so linked with transmission as to make it an inseparable part of a transaction in interstate commerce." 286 U.S. at 178-79. Only such discrete, essentially local activities are *preparatory* for the first stages of natural gas distribution within the narrow scope of the Section 1(b) production and gathering exemption defined by *Northern Natural* and the other authorities discussed above.

B. The D.C. Circuit's Application Of The Central-Aggregation-Point Test Does Not Comport With This Court's Prior Construction Of The Gathering Exemption Under Section 1(b) Of The NGA.

Because the D.C. Circuit regarded *Exxon Mobil* as controlling, no effort was made by the D.C. Circuit in this case to reconcile the reclassification of the extensive pipeline systems at issue with applicable precedent of this Court. Indeed, both the FERC's decisions on review and the D.C. Circuit's decision below are *silent* with respect to the *Northern Natural* instruction that pipeline facilities properly within the NGA Section 1(b) production and gathering exemption are "narrowly confined to the physical acts of drawing gas from the

earth and preparing it for the first stages of distribution." 372 U.S. at 90. Nor was any effort made to relate the reclassified facilities to established matters of "local concern" such as "conservation" or "drilling and spacing of wells and the like," as directed by *Interstate Gas Co.*, 331 U.S. at 691, and *Colorado Interstate Natural Gas*, 324 U.S. at 603. And there is no attempt to show that the movement of gas over the reclassified facilities represents a distinctly local collection of gas or a "process essentially local in character and complete in itself," as opposed to "inseparable part[s] of a transaction in interstate commerce, as directed by *Hughes Bros. Timber Co.*, 272 U.S. at 475, *Michigan-Wisconsin*, 347 U.S. at 169, and *Utah Power*, 286 U.S. at 178-79.

To the contrary, under the central-aggregation-point test applied below and in *Exxon Mobil*, gathering is said to end and transmission to begin where two or more segments of an OCS pipeline join for the last time, or nearly the last time, and a single line moves natural gas toward shore. *See Sea Robin Pipeline Co.*, 87 F.E.R.C. (CCH) ¶ 61,384 (1999), *reh'g denied*, 92 F.E.R.C. (CCH) ¶ 61,072 (2000). But the joinder of large pipeline segments on the OCS has nothing to do with the narrow construction of "gathering" under Section 1(b) and the ample precedent of this Court discussed above. Rather, the FERC's "central-aggregation-point" is more plainly understood merely as a point of intersection of pipelines on the mainline pipeline system, where the bulk of production has been aggregated on a single mainline.[13]

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[13] The joinder of pipeline segments is analogous to the confluence of the Swamp River and the larger Pigeon River in *Hughes Bros. Timber Co., supra.* In that case, which addressed the appropriate reach of state authority recognized under the Commerce Clause prior to the enactment of the NGA, the confluence or joinder of a smaller stream into a larger stream "was *not* gathering . . . for subsequent interstate shipment, it *was* the interstate movement itself." 272 U.S. at 475 (emphasis added). The clear analogy between the continuous stream of river transport considered in *Hughes Bros. Timber Co.* and the continuous stream of pipeline transportation considered in the case below demonstrates that the D.C.

Judge Edwards, in his dissenting opinion in *Exxon Mobil*, recognized that the central-aggregation-point test was at odds with *Northern Natural* and that FERC had not provided a rational explanation as to why the central-aggregation-point test determines where gathering ends and transmission begins. As is also true in this case, Judge Edwards correctly concluded that the application of the central-aggregation-point test in *Exxon Mobil* inappropriately expands the definition of gathering far beyond the narrow definition envisioned in *Northern Natural* to encompass a "massive pipeline complex." 297 F.3d at 1089. He observed that aggregation in this sense is far beyond the local collection or gathering of gas from wells in preparation for the first stages of distribution:

> FERC has . . . asked this court to validate a determination that 'gathering' ends where two large lines become one and grow proportionately wider as a result. This proposition is perplexing on its own terms, and it is unlawful in light of what we have been told by the Supreme Court in *Northern Natural Gas Co.*, namely that production and gathering entail *only* 'the physical act[] of drawing the gas from the earth and preparing it for the first stages of distribution.'

297 F.3d at 1093 (emphasis added).

Judge Edwards' discussion of the junction of two "forks in the pipeline road" in *Exxon Mobil* is equally applicable to the "forks in the pipeline road" identified as central-aggregation-points in the decisions below. No physical actions take place at these locations that can be characterized as *preparatory* for the first stages of distribution within the meaning of *Northern Natural*. The hundreds of miles of previously certificated transportation facilities upstream from the central-aggrega-

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Circuit's reading of the production and gathering exemption under Section 1(b) exceeds the limited reach of state authority recognized under the Commerce Clause when the NGA was enacted and thus exceeds the scope of the gathering exemption intended by Congress.

tion-points cannot rationally be understood as matters of "local concern" such as "conservation" or "drilling and spacing of wells and the like," as directed by *Interstate Natural Gas* and *Colorado Interstate Gas*. Similarly, the transportation of gas over these extensive pipeline facilities cannot be explained as the distinctly local "preparatory gathering" of gas or a "process essentially local in character and complete in itself" and "separated" from subsequent interstate transportation, as required by *Hughes Bros. Timber Co.*, *Michigan-Wisconsin and Utah Power*. To the contrary, such preparatory acts of distinctly local concern, realistically separate from subsequent downstream transportation of gas, logically can only occur far upstream from the central-aggregation-points identified by the FERC decisions below, much closer to the production platforms where, prior to reclassification of Transco's transmission facilities as gathering, gas was captured and prepared for receipt by and transport in Transco's certificated transportation facilities.

C. The D.C. Circuit Cannot Justify Its Failure To Follow This Court's Interpretation Of The Gathering Exemption Under Section 1(b) Of The NGA.

The D.C. Circuit makes no effort in its decision below to square the Commission's central-aggregation-point with this Court's guidance in *Northern Natural* and the other cases cited above and avoids the issue by reliance on the majority opinion in *Exxon Mobil*. In *Exxon Mobil*, the majority also avoided the import of *Northern Natural* by citing the Fifth Circuit's decision in *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989), which the *Exxon Mobil* majority characterizes as requiring FERC "to recognize that 'the pattern of gathering and distribution on shore differs from the pattern of transportation and gathering of gas from the middle of the Gulf to the mainland.'" 297 F.3d at 1085, *quoting Sea Robin Pipeline Co.*, 127 F.3d at 370. The *Exxon Mobil* majority then cited such "different physical realities" as allowing a change in the scope

of the production and gathering exemption in Section 1(b) of the NGA, because "[w]ords in statutes can enlarge or contract their scope as other changes, in the law or in the world, require their application." 297 F.3d at 1086 (*quoting West v. Gibson*, 527 U.S. 212, 218 (1999)).

But *West* is *not* authority for disregarding or enlarging this Court's prior construction of the production and gathering exemption under Section 1(b) of the NGA. Unlike the well-known Supreme Court precedent that has defined the meaning of the production and gathering exemption under Section 1(b) of the NGA, in *West* there was no prior Supreme Court precedent defining the meaning of the statutory terms at issue.[14]

Neither FERC nor the D.C. Circuit can justify an enlargement of the production and gathering exemption beyond that defined by the prior precedent of this Court. "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."[15] Thus, "the Court's interpretation of a statutory provision trumps a subsequent agency interpretation that is inconsistent with the Court's precedent."[16]

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[14] *West* involved the construction of the meaning of the words "appropriate remedies" in Section 717(b) of Title VII of the Civil Rights Act of 1964, which addresses the enforcement of the basic Federal Government employment anti-discrimination standard in Section 717(a). *West* holds that "appropriate remedies" may include compensatory damages even though Section 717(b) does not explicitly refer to compensatory damages. 527 U.S. at 219. The Court noted that the word "including" in the statute makes clear that the Congressional authorization is not limited to the specific remedies there mentioned. *Id.*

[15] *Neal v. United States*, 516 U.S. 284, 295 (1996). *See also California v. FERC*, 495 U.S. at 499 ('considerations of *stare decisis* have special force in the area of statutory interpretation') (*quoting Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

[16] *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000) (citing Neal). *See also Lechmere, Inc. v. Nat'l Labor*

Further, contrary to the faulty reasoning of the majority in *Exxon Mobil*, and the reliance on *Exxon Mobil* by the D.C. Circuit in this case, regulatory changes in the natural gas industry cannot provide a justification for the FERC to enlarge the scope of the gathering exemption by reclassifying previously certificated transportation facilities as nonjurisdictional gathering facilities. "(I)t is well settled that . . . the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce." *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. at 684. Just as subsequent decisions of the Supreme Court do not affect the jurisdiction of the Commission as fixed by the NGA and interpreted by the Court, subsequent policy determinations by the FERC such as unbundling under Order No. 636 cannot alter the scope of the Commission's jurisdiction from that set by the NGA and defined by the Court. The jurisdictional reach of the FERC as expressed in Section 1(b) of the NGA is fixed by the intent of Congress in 1938 as expressed in the NGA and interpreted by this Court, and can not be altered by later regulatory initiatives. *See also Maislin Industries*, 497 U.S. at 135-36.

In sum, the authorities are clear that Congress structured Section 1(b) of the NGA to grant broad jurisdictional authority to FERC, excepting only such local matters that had been recognized as subject to State authority consistent with this Court's construction of the Commerce Clause. The D.C. Circuit's decision below and in *Exxon Mobil* improperly expand the production and gathering exemption intended by Section 1(b) of the NGA, as interpreted by this Court, and thereby unlawfully curtail the scope of federal authority that Congress

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Relations Bd., 502 U.S. 527, 536-37 (1992) and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (agencies are entitled to no deference to depart from Supreme Court interpretations of statutory terms).

intended to put in place under the NGA. As Judge Edwards correctly stated in *Exxon Mobil*, application of FERC's central-aggregation-point test for demarcating gathering from transmission facilities on the OCS is unlawful under *Northern Natural*.

II. THE D.C. CIRCUIT'S CONSTRUCTION OF THE ABANDONMENT PROVISIONS OF THE NGA IS IN DIRECT CONFLICT WITH PRECEDENT OF THE FIFTH CIRCUIT AND IS CONTRARY TO THE STATUTORY REQUIREMENT THAT NO CERTIFICATED FACILITIES OR SERVICE MAY BE ABANDONED UNLESS APPROVED BY FERC AS IN THE PUBLIC CONVENIENCE AND NECESSITY

Beyond its unlawful expansion of the gathering exemption under Section 1(b) of the NGA, the D.C. Circuit compounded its error by allowing an abandonment of the reclassified pipeline systems by sale to a nonjurisdictional affiliate without ensuring the protection of the public interest as required by Section 7(b) of the NGA. The D.C. Circuit's failure to determine whether the public interest would be served is in direct conflict with a ruling by the Fifth Circuit that the FERC *must* ensure the public interest is not disserved before allowing abandonment.

Section 7 of the NGA provides the FERC with jurisdiction over both the commencement of jurisdictional service and the cessation of jurisdictional service. Under Section 7, FERC has the authority and responsibility to "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." *California v. Southland Royalty Co.*, 436 U.S. at 524. Under NGA Section 7(b), the Commission may approve the abandonment of certificated facilities and services *only* upon a showing that abandonment will serve the public interest. *Transcontinental Gas Pipe Line Corp. v. FPC*, 488 F.2d at 1328; *Michigan Consolidated Gas Co. v. FPC*, 283 F.2d at 214.

In this case, essentially all of the pipeline facilities reclassified as gathering were subject to certificates issued by FERC pursuant to NGA Sections 7(c) and (e).[17] But the Commission and the D.C. Circuit ignored the requirements of Section 7(b), and the affirmative showing by Petitioners that abandonment was anti-competitive and not in the public interest, by allowing Transco to abandon the reclassified pipeline systems by selling the systems to a nonjurisdictional corporate affiliate with *no* showing that the "public convenience or necessity" permits abandonment. Specifically, the D.C. Circuit held that "FERC properly determined that under NGA section 7(b) it had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering." 331 F.3d at 1022, Pet. App. 18a.

The D.C. Circuit acknowledged the conflict with the Fifth Circuit on this point:

> We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

Id.

As acknowledged by the D.C. Circuit, the Fifth Circuit in *Pacific Gas & Electric Co.* held precisely the opposite: Under Section 7(b) a pipeline may *not* abandon reclassified gathering facilities, or the jurisdictional services provided by such facilities, without ensuring that the "future public convenience or necessity permit such abandonment." *Pacific Gas & Electric Co.*, 106 F.3d at 1197.

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[17] *See Transcontinental*, 96 F.E.R.C. at 61,429, 61,431, Pet. App.127a-129a, 132a-134a; 96 F.E.R.C. at 61,449, Pet. App. 60a-62a; 96 F.E.R.C. at 61,966, Pet. App. 198a-200a.

As the Fifth Circuit correctly recognized, but the D.C. Circuit below failed to apprehend, the clear language of the NGA permits no exceptions for facilities that are certificated as transportation facilities in the public convenience and necessity, and thereby dedicated to jurisdictional interstate service, but years later are reclassified as gathering facilities. Further, Petitioners are aware of no precedent of this Court that can be construed to permit an exception to the statutory requirements for certificated transportation facilities that are subsequently reclassified as gathering. To the contrary, the Court has stated that Section 7(b) "simply does not admit of *any* exception to the statutory procedure." *United Gas Pipe Line Co. v. McCombs*, 442 U.S. 529, 536 (1979) (emphasis added).[18] Simply stated, certification of jurisdictional transportation facilities pursuant to Section 7(c) of the NGA constitutes a dedication to interstate service that cannot be eliminated by a later reclassification of the facilities as non-jurisdictional gathering. Elimination of the interstate dedication can only be accomplished by an abandonment pursuant to Section 7(b) based on a finding that the public convenience and necessity will in no way be disserved by abandonment.

III. RESOLUTION OF THE APPLICATION OF THE NGA TO OFF-SHORE PIPELINES REQUIRES IMMEDIATE REVIEW.

This case is of extraordinary importance and review by this Court is critical. As the FERC has recognized, the OCS now accounts for approximately 27 percent of U.S. natural gas

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[18] The FERC itself previously refused to permit abandonment of certificated facilities that had been reclassified as gathering unless the pipeline carried its burden of showing that abandonment was in the public interest. *See Trunkline Gas Co.*, 67 F.E.R.C. (CCH) ¶ 61,256, 61,859 (1994) ("[B]ecause for each of the facilities which we have determined to be gathering, [the pipeline] applied for and accepted a certificate of public convenience and necessity under section 7(c) to construct and operate the facility, and used the facilities to bundle together gathering and transmission, the latter being a jurisdictional service, abandonment authority is required.").

production and 17 percent of proven reserves.[19] Further, new producing fields must be discovered and developed on the OCS to meet this nation's future energy needs. The decision below has created great uncertainty concerning the application of the NGA on the OCS, destroyed producers' reliance and expectations concerning FERC's ongoing regulatory oversight over monopolistic pipelines on the OCS, and discouraged the investment of the huge sums of capital that are required to discover and develop essential production areas on the OCS.

As this Court previously has instructed, deference must be accorded to "longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *California v. FERC*, 495 U.S. 490, 499 (1990). The D.C. Circuit's departure from this Court's decisions concerning the scope of the gathering exemption under Section 1(b) of the NGA and the D.C. Circuit's disregard of the strict application of the abandonment requirements under Section 7(b) of the NGA improperly disrupt "a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *Id.* at 500. Strict conformance with this Court's interpretations of the NGA is particularly warranted given the billions of dollars of investments made by producers to develop offshore properties in reliance on the ongoing regulation of interstate pipeline transportation on the OCS. *See Payne v. Tennessee*, 501, U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

The FERC itself has recognized the validity of these concerns. In the Commission's *OCS Statement of Policy*, FERC recognized that producers relied on the Commission's regulatory oversight and rate regulation and that elimination of the

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[19] *OCS Statement Policy*, 74 F.E.R.C. at 61,752 n.5.

Commission's oversight would expose the producers to pipelines' monopoly power:

> [P]roducers . . . have relied on regulated interstate pipelines to transport most, if not all, of their gas onshore and may be captive to these pipelines if Commission oversight were suddenly withdrawn.[20]

The FERC also has recognized that regulatory uncertainty will have detrimental effects on the exploration for, and development of, needed new production areas on the OCS.

> [T]he Commission recognizes that such projects are expensive, and would not be undertaken in an atmosphere of regulatory uncertainty. We do not want to employ a policy that might impede exploration and development of these new areas.[21]

But extreme regulatory uncertainty has been created. Under the D.C. Circuit's decision below, the FERC has exceedingly broad discretion to define the scope of the production and gathering exemption under Section 1(b), well beyond the intent of Congress as clearly construed by long-standing decisions of this Court. Moreover, the conflict between the D.C. Circuit and the Fifth Circuit concerning Section 7(b) of the NGA causes additional uncertainty as to whether pipelines must show that the public interest is served by an abandonment of reclassified facilities that were previously certificated pursuant to Section 7(c) of the NGA. These issues will be recurring as additional offshore pipeline systems seek to avoid FERC rate regulation by taking advantage of FERC's expansive central-aggregation-point test for distinguishing between nonjurisdictional gathering systems and jurisdictional interstate transportation facilities.

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[20] *OCS Statement of Policy*, 74 F.E.R.C. at 61,757.

[21] *OCS Statement of Policy*, 74 F.E.R.C. at 61,756.

IV. OBJECTIONS RAISED TO THE PETITIONS FOR CERTIORARI IN *EXXON MOBIL* ARE NOT PRESENT HERE

In *Exxon Mobil*, the Sea Robin offshore pipeline did not seek to abandon any reclassified facilities pursuant to Section 7(b) of the NGA. On this basis, the Brief For The Federal Energy Regulatory Commission In Opposition states that *Exxon Mobil* "does not present any issue of pressing importance regarding FERC's authority to regulate rates for offshore services on the OCS." Brief In Opposition at 10. "[B]ecause Sea Robin has not ceased performing any services subject to FERC's rate regulation, this case is not an appropriate vehicle to determine whether Section 7(b) is triggered when a pipeline ceases performing services that FERC has reclassified." *Id.* at 17.

The Petitioners in *Exxon Mobil* dispute FERC's contentions. But in any event, the considerations raised by the FERC's Brief In Opposition in *Exxon Mobil* are not present here. In this case, Transco *did* seek to abandon the reclassified pipeline systems by transfer to a nonjurisdictional affiliate, and FERC granted the abandonment. Consequently, this case squarely involves a pipeline that has abandoned facilities and services subject to FERC's rate jurisdiction.

CONCLUSION

For the foregoing reasons, the Petitioners request that the Writ of Certiorari be granted and the judgment below reversed.

Respectfully submitted,

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September 15, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 01-1327, 02-1006, 02-1007, 02-1051 to 02-1053, 02-1072 to 02-1076.

WILLIAMS GAS PROCESSING—GULF COAST COMPANY, L.P. AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

DYNEGY MARKETING AND TRADE, *et al.*,
Intervenors.

Argued May 12, 2003.
Decided June 20, 2003.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

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Thomas J. Eastment argued the cause for petitioners/intervenors Producer. With him on the briefs were *Joshua B. Frank*, *James M. Costan*, *T. Alana Deere*, *Timothy J. Jacquet*, *Joseph E. Mixon*, *Frederick T. Kolb*, *Douglas W. Rasch*, and *Charles J. McClees, Jr.* *Linda L. Geoghegan* entered an appearance.

Joseph S. Koury argued the cause for petitioners/intervenors Williams Gas Processing-Gulf Coast Company,

L.P., *et al.* With him on the briefs were *James T. McManus*, *Mari M. Ramsey*, *Gisela B. Cherches* and *David A. Glenn*.

David H. Coffman, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were *Cynthia A. Marlette*, General Counsel, and *Dennis Lane*, Solicitor.

Before: GINSBURG, Chief Judge, and ROGERS and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge.

Transcontinental Gas Pipe Line Corp. ("Transco") petitioned the Federal Energy Regulatory Commission ("FERC") for approval to transfer some of its pipeline facilities to its affiliate, Williams Gas Processing-Gulf Coast Co. ("WGP"), and to certify that the facilities serve gathering rather than transmission functions. FERC approved the applications in part and denied them in part, and Transco and WGP now challenge the portions of the orders that denied the requests, contending that FERC's assertion of jurisdiction is contrary to precedent regarding the exemption of gathering facilities under the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b) (2000). A coalition of natural gas producers ("the Producers") also petitions the court for review, objecting to those portions of FERC's orders that granted the abandonment and reclassification of facilities as gathering for lack of a reasoned determination and as contrary to the public interest. Our review of these petitions is instructed by *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1084 (D.C.Cir. 2002), where the court stated that it will defer to FERC's reasonable determinations regarding gathering status under NGA section 1(b), 15 U.S.C. § 717(b). We hold that petitioners fail to demonstrate that FERC's choices are "unreasonable and its chosen line[s] of demarcation [are] not within a 'zone of reasonableness' as distinct from the question of whether

the line[s] [are] 'precisely right.'" *ExxonMobil*, 297 F.3d at 1084; *see Conoco Inc. v. FERC*, 90 F.3d 536, 544 (D.C.Cir.1996). Accordingly, we deny the petitions inasmuch as FERC considered the appropriate factors under the primary function test and sufficiently explained its reasoning.

I.

Section 1(b) of the NGA distinguishes between facilities that are used for "the transportation of natural gas in interstate commerce," which are subject to FERC's jurisdiction, and those used for "gathering," which are not. 15 U.S.C. § 717(b). "Gathering" is generally defined as "the process of taking natural gas from the wells and moving it to a collection point for further movement through a pipeline's principal transmission system." *Conoco*, 90 F.3d at 539 n. 2 (citing *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n. 1 (10th Cir.1990)). Although "[t]he line between jurisdictional transportation and nonjurisdictional gathering is not always clear," *Conoco*, 90 F.3d at 542, it is central to this case.

Since 1983, FERC has used a multi-factor "primary function test" to determine "whether a facility is devoted to the collection of gas from wells—gathering—or to the further ('downstream') long-distance movement of gas after it has been collected—interstate transportation." *Conoco*, 90 F.3d at 543 (citing *Farmland Indus., Inc.*, 23 F.E.R.C. ¶ 61,063, at 61,143, 1983 WL 39391 (1983); *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,987-88, 1990 WL 1241336 (1990)). Under the primary function test, FERC considers six physical criteria: (1) the pipelines' length and diameter; (2) the central point in the field; (3) the facility's geographic configuration or pattern; (4) the location of compressors and processing plants, particularly where the pipelines are located behind the plant; (5) the location of wells along all or part of the facilities; and (6) the line's operating pressure. *ExxonMobil*, 297 F.3d at 1077 (citing *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C.Cir.2000)). FERC also accounts for

certain nonphysical factors, including: (1) the facility's purpose, location, and operation; (2) the pipeline owner's general business activity; (3) the objectives of the NGA and other pertinent legislation; and (4) the changing technical and geographic nature of exploration and production activities. *ExxonMobil,* 297 F.3d at 1077. No single criterion is dispositive, and not all of the factors apply in all situations. *Id.* (citing *Williams Field Servs. Group, Inc. v. FERC,* 194 F.3d 110, 116 (D.C.Cir.1999); *Conoco,* 90 F.3d at 543).

FERC initially developed the primary function test for classifying onshore facilities, and it later modified the test in considering the increasing number of pipelines that were being constructed offshore on the Gulf of Mexico's Outer Continental Shelf ("OCS"), where gathering and distribution patterns are somewhat different. *ExxonMobil,* 297 F.3d at 1077 (citing *EP Operating Co. v. FERC,* 876 F.2d 46 (5th Cir.1989)). Because offshore pipelines often must transport raw gas over longer distances, FERC adopted a "sliding scale" approach that permitted gathering pipelines of greater length and diameter in correlation with distance from shore and water depth. *ExxonMobil,* 297 F.3d at 1078 (citing *Amerada Hess,* 52 F.E.R.C. at 61,988). When FERC applied this modified approach in determining that the Sea Robin Pipeline Company's pipelines were jurisdictional transmission facilities, the Fifth Circuit reversed, questioning FERC's heavy emphasis on the facilities' size and on nonphysical factors and inviting FERC to reformulate its primary function test in light of the "physical, geographical and operational characteristics of pipelines in the OCS." *Sea Robin Pipeline Co. v. FERC,* 127 F.3d 365, 369-71 (5th Cir.1997). On remand, FERC determined that the "behind-the-plant" test is not determinative of the gathering question offshore, and that instead it would look at the offshore system's configuration to locate a central point where gas is aggregated for transportation onshore. *Sea Robin Pipeline Co.,* 87 F.E.R.C. ¶ 61,384, at 62,425, 1999 WL 444654 (1999) (*Sea Robin II*). FERC

explained that this central aggregation point is analogous to the "central-point-in-the-field" criterion for onshore systems and should be "given weight in identifying the demarcation point between gathering and transportation on OCS pipeline systems." *Id.* at 62,426. FERC also emphasized that it would focus primarily on physical factors, according only secondary importance to nonphysical factors. *Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072, at 61,284, 2000 WL 1100267 (2000). This court subsequently held that FERC reasonably applied its reformulated primary function test to the Sea Robin system. *ExxonMobil*, 297 F.3d at 1087.

It was against the backdrop of the evolving primary function test and the distinction between jurisdictional transmission and exempt gathering facilities that Transco and WGP filed the applications at issue. In the parlance of the oil and gas industry, a "spindown" occurs when a natural gas transporter transfers operation of its facilities to a gathering affiliate. *See Conoco*, 90 F.3d at 541. In 1996, Transco sought FERC's authorization, pursuant to NGA section 7(b), 15 U.S.C. § 717f(b), to spin down a number of its facilities to WGP as part of a comprehensive corporate restructuring plan. Transco's application covered a large number of its facilities on seven different pipeline systems in Texas and Louisiana and offshore on the OCS. On the same day, WGP petitioned FERC for an order declaring that the facilities it intended to acquire from Transco—most of which FERC had previously certificated as transmission facilities under section 7(c) of the NGA—were gathering facilities exempt from its jurisdiction under section 1(b).

FERC dismissed the comprehensive application without prejudice. *Transcon. Gas Pipe Line Corp.*, 76 F.E.R.C. ¶ 61,317, at 62,543, 1996 WL 544775 (1996) ("Comprehensive Order"). FERC observed that "[t]he physical parameters of the subject facilities are massive and complex, involving over 3,100 miles of pipeline," and that the number of facili-

ties included in Transco's application "is without precedent in prior 'spin-down' cases." *Id.* (footnote omitted). Explaining that important differences existed among the many pipelines that Transco included in its application, and that, "[a]t the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities," *id.* at 62,543, FERC also noted that "a decision to grant the requested abandonment in this case could set a precedent for ending NGA jurisdiction on the OCS, as it is likely that virtually every similar interstate pipeline on the OCS then would file a similar application." *Id.* at 62,542. Because "[n]either Transco nor WGP included in [its] pleadings an alternative request that [FERC] find specific parts of the facilities to be . . . nonjurisdictional," FERC dismissed the comprehensive application while stating that Transco and WGP could still file "another proposal requesting that [FERC] consider discrete portions of the facilities . . . to be gathering." *Id.* at 62,543. FERC denied the request for rehearing, noting that "the parties [did] not seek to parse the Transco facilities; rather, they continue[d] to insist that [FERC] should find all the facilities at issue to be gathering." *Transcon. Gas Pipe Line Corp.*, 95 F.E.R.C. ¶ 61,396, at 62,475-76 & n.3, 2001 WL 672549 (2001) ("*Comprehensive Rehearing Order*").

Transco and WGP then filed three sub-spindown applications seeking permission to abandon and to reclassify discrete portions of the Transco systems. FERC approved the spindown of the North Padre Island and Central Texas Systems. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,115, at 61,429, 2001 WL 840622 (2001) ("*North Padre/Central Texas Order*"). Relying on the reformulated primary function test set forth in *Sea Robin II*, 87 F.E.R.C. ¶ 61,384 (1999), FERC determined that each system featured a central aggregation point demarcating gathering and transmission functions. *North Padre/Central Texas Order*, 96 F.E.R.C. at 61,440-41, 2001 WL 840622 (2001). FERC applied similar

reasoning in approving Transco's abandonment of portions of the North High Island and West Cameron systems, again pinpointing central aggregation points and identifying some, but not all, of the pipelines as serving gathering functions. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,118, at 61,449, 61,458-60, 2001 WL 840621 (2001) ("*North High Island/West Cameron Order*"). Finally, FERC approved Transco's requested abandonment of the Central Louisiana facilities and, upon locating a central aggregation point at Vermilion Block 67, designated part of the system as gathering. *Transcon. Gas Pipe Line Corp.*, 96 F.E.R.C. ¶ 61,246, at 61,966, 2001 WL 34078519 (2001) ("*Central Louisiana Order*"). Transco and WGP sought rehearing of those portions of the orders that designated parts of the systems as transmission facilities, and the Producers sought rehearing of the gathering determinations. FERC denied the rehearing requests. *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,296, 2001 WL 1631914 (2001), *order on reh'g, North Padre/Central Texas Order*; *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,298, 2001 WL 1631916 (2001), *order on reh'g, Central Louisiana Order*; *Transcon. Gas Pipe Line Corp.*, 97 F.E.R.C. ¶ 61,300, 2001 WL 1631918 (2001), *order on reh'g, North High Island/West Cameron Order*.

II.

Transco and WGP contend that FERC erred in rejecting their initial comprehensive application and improperly determined in the sub-spindown proposals that portions of the facilities were transmission rather than gathering. In considering these objections, the court will sustain FERC's factual findings if they are supported by "substantial evidence," 15 U.S.C. § 717r(b); *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1115 (D.C.Cir. 1992) (per curiam), and will set aside FERC's actions if they are arbitrary and capricious, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct.

2856, 2866-67, 77 L.Ed.2d 443 (1983). The court also applies *Chevron*'s familiar two-step framework to FERC's interpretation of section 1(b) of the NGA. *ExxonMobil*, 297 F.3d at 1083 (citing *Chevron, U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Moreover, the court is mindful that in "evaluating and balancing the several factors under the primary function test, [FERC] brings to bear its considerable expertise about the natural gas industry." *Conoco*, 90 F.3d at 544 (citations omitted). Consequently, "[t]he burden is on the petitioners to show that [FERC's] choices are unreasonable and its chosen line of demarcation is not within a 'zone of reasonableness' as distinct from the question of whether the line drawn by [FERC] is 'precisely right.'" *ExxonMobil*, 297 F.3d at 1084 (citations omitted).

A.

According to Transco and WGP, FERC misconstrued the comprehensive application as an "all or nothing" request -- in other words, FERC misunderstood Transco and WGP as requesting that FERC allow them to abandon and reclassify all of their facilities or none at all. Transco and WGP maintain that their filings contained no such "all-or-nothing" contingency. Because Transco and WGP failed to object to FERC's all-or-nothing characterization in seeking rehearing, they are precluded from raising this argument here. Section 19(b) of the NGA, 15 U.S.C. § 717r(b), bars the court from considering on review any objection that was not raised on rehearing, without good cause shown. *Fed. Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-99, 75 S.Ct. 467, 470-71, 99 L.Ed. 583 (1955); *ASARCO v. FERC*, 777 F.2d 764, 774-75 (D.C.Cir.1985). Transco and WGP sought rehearing, challenging FERC's denial of the comprehensive application on a number of grounds, but, despite FERC's invitation to clarify that they were making an alternative request that FERC find that some parts of the

facilities perform a gathering function, Transco and WGP nowhere requested that FERC sever the comprehensive application. Having filed a rehearing request that implicitly accepted the *Comprehensive Order*'s all-or-nothing understanding, and not having shown good cause for failing to raise their severance argument before the agency, Transco and WGP are barred from challenging that understanding before the court. *See ASARCO*, 777 F.2d at 775.

FERC therefore was forced either to declare that all of the facilities at issue performed a gathering function or to deny the comprehensive application altogether. In this posture, jurisdiction and merits overlap, for the court must consider the merits of FERC's decision that at least one of the facilities performed a transmission function, thereby precluding approval of the all-or-nothing petition. FERC's decision in the *Comprehensive Order* was driven by the primary function analysis: FERC considered the relevant factors—including pipeline size and length, volume of gas, and water depth—and relied on no irrelevant factors. *Comprehensive Order*, 76 F.E.R.C. at 62,542-43 & nn. 9-12. Transco and WGP contend that FERC was preoccupied with size, without regard to the "sliding scale" analysis required by *EP Operating*, 876 F.2d at 48-49. On the contrary, FERC's orders demonstrate that FERC was concerned with the transmission function of the pipelines located closest to shore, in the shallowest waters, *id.* at 62,543—precisely the type of analysis contemplated by the sliding scale approach, *ExxonMobil*, 297 F.3d at 1078 (citing *Amerada Hess*, 52 F.E.R.C. at 61,988). Specifically, FERC found that Transco and WGP had "not adequately explained how . . . existing interstate pipeline facilities that are not located in deep OCS waters, *i.e.*, waters in excess of 200 meters, can properly be reclassified as gathering lines under the 'primary function' test." *Comprehensive Order*, 76 F.E.R.C. at 62,543. In light of this analysis, it was reasonable for FERC to conclude that, "[a]t the very minimum, large portions of the facilities are

clearly properly classified as jurisdictional transmission facilities." *Id.*

B.

Regarding two of the three sub-spindown proposals, Transco and WGP contend that FERC erred by failing to recognize the physical realities of gathering exhibited by all of the pipelines addressed in the *Central Louisiana Order* and the *North High Island/West Cameron Order,* and thus failed properly to apply the modified primary function test for offshore gathering systems. *See EP Operating Co.,* 876 F.2d at 48-49; *Amerada Hess,* 52 F.E.R.C. ¶ 61,268, 1990 WL 1241336 (1990).

Transco and WGP contend that the *Central Louisiana Order* was in error for two primary reasons. First, they claim that FERC neglected to apply *Amerada Hess*'s sliding-scale approach, which was designed to "allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area." *Amerada Hess,* 52 F.E.R.C. at 61,988. Transco and WGP maintain that FERC failed to recognize that the Central Louisiana system's spine-and-lateral configuration is characteristic of a gathering function, regard-less of whether the system is on-or offshore, and that the offshore pipelines are longer and larger only because of the distances involved, not because their function is different. Second, Transco and WGP contend that in concluding that Vermilion Block 67 marks the central aggregation point at which the offshore lines convert from gathering to transmission, FERC ignored the fact that the offshore pipelines are part of the spine-and-lateral gathering system, and that the Cow Island Junction is the proper point of central aggregation.

Because "[i]t is for [FERC], in the first instance, to determine the patterns of gathering and transportation in the

offshore context," the court is "generally 'unwilling to review line-drawing performed by [FERC] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'" *ExxonMobil*, 297 F.3d at 1085 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C.Cir.1998)). The *Central Louisiana Order* makes clear that FERC properly considered the facilities' diameter (sixteen and twenty inches), length (forty- two miles), and the source of the pipelines' pressure (from the wellhead), as well as the absence of processing plants (which, FERC explained, means little offshore). 96 F.E.R.C. at 61,976. Transco and WGP have not carried their burden of showing that FERC's determination falls outside of a "zone of reasonableness." *ExxonMobil*, 297 F.3d at 1084. The court in *ExxonMobil* affirmed FERC's use of the central-aggregation-point test for offshore systems, *id.* at 1087, and a map of the Central Louisiana system shows that FERC reasonably concluded that the entire system features two aggregation points—one at Vermilion Block 67 and the other at Cow Island Junction. Given the system's configuration -- a spine-and-lateral system in which many smaller pipelines branch off of a central "spine"—it was permissible for the Commission to find that some of the pipelines assume a transmission function when they converge at Vermilion Block 67, while others serve a gathering purpose until they reach Cow Island. 96 F.E.R.C. at 61,977. "Reasonable people may disagree as to where gathering ends and transportation begins," and this court will not substitute its judgment for a FERC determination that is not "patently unreasonable." *ExxonMobil*, 297 F.3d at 1085; *see also Conoco*, 90 F.3d at 544.

The same deference principles apply to FERC's findings in the *North High Island/West Cameron Order*. This system is shaped like an inverted "Y" with two "legs"—the North High Island pipelines to the west and the West Cameron pipelines to the east—that converge onshore at the Station 44/Cameron

Meadows complex. FERC determined that only a portion of the North High Island subsystem is nonjurisdictional, locating a central aggregation point at Block 10, *North High Island/West Cameron Order,* 96 F.E.R.C. at 61,458-59, and that the entirety of the West Cameron subsystem serves a transmission function, *id.* at 61,459. Transco and WGP contend that FERC erred by evaluating the east and west legs independently rather than treating the Station 44/Cameron Meadows complex as the central aggregation point. According to Transco and WGP, the entire system, like the *Sea Robin* system, must be evaluated as a whole, and FERC cannot view each leg of the "Y" independently. But FERC explained that the two subsystems "generally operate independently, with the North High Island facilities collecting gas from the west in Offshore Texas and the West Cameron facilities collecting gas from the east in Offshore Louisiana." *Id.* at 61,458. Then, in assessing each subsystem, FERC noted the differences between the two. FERC reasonably concluded, in light of these differences, that the subsystems serve transmission functions before converging at the Station 44/Cameron Meadows complex. As in *ExxonMobil,* it was permissible for FERC to conclude "that different parts of the system required different jurisdictional treatment." *Exxon Mobil,* 297 F.3d at 1085.

Transco and WGP next contend that FERC improperly designated a central aggregation point on the North High Island facility rather than finding the whole facility to be gathering. FERC explained that "[t]he North High Island subsystem consists of approximately 174 miles of 4 to 30-inch pipeline," most of which is "relatively small, with the lines ranging from 4 to 24-inches in diameter." *North High Island/West Cameron Order,* 96 F.E.R.C. at 61,458. "The longest segment is a 63 mile, 24-inch Line C that connects all the upstream facilities with the plant complex onshore." *Id.* FERC concluded that "[a]lthough the North High Island Block 10 point does not exhibit as strong an indication of a

marked physical change in facilities as was the case in *Sea Robin*," the interconnection of the 24-inch Line C with a 12-mile, 16-inch line at Block 10 nonetheless "serves as the central point of aggregation for the subsystem, where all the gas gathered upstream is delivered to a single point for transportation onshore." *Id.* at 61,458-59. In reaching this conclusion, FERC considered the length and diameter of the pipeline, the volume of gas transmitted, the shape of the subsystem, and the gas pressure. *Id.* at 61,459. Given that FERC considered the pertinent factors, its conclusion was not arbitrary and capricious. *See Conoco,* 90 F.3d at 544.

Transco and WGP further contend that FERC erred in concluding that all of the West Cameron facility is transmission. In assessing the West Cameron facility, FERC considered the length, diameter, and pressure of the pipeline on the West Cameron subsystem; the location of wells and lack of processing plants along the line; and the shape of the long, continuous pipeline connecting production in the OCS to the onshore processing facilities. *North High Island/West Cameron Order,* 96 F.E.R.C. at 61,459-60. Based on these factors, FERC found "that the West Cameron subsystem's primary function is that of a transmission facility, not a gathering one." *Id.* at 61,460. This conclusion was not arbitrary and capricious.

Transco and WGP contend, finally, that FERC failed to comply with its own precedent when it ignored the historical evolution of the Central Louisiana and North High Island/ West Cameron systems in determining their primary function. In *Enron Gulf Coast Gathering L.P.,* 95 F.E.R.C. ¶ 61,318, 2001 WL 586951 (2001), FERC stated that the fact that the pipelines in question "were built in separate stages over a number of years after" the original system's construction "in order to access new gas supplies on the OCS also speak[s] to their primary gathering function." *Id.* at 62,097 (footnote omitted). Transco and WGP contend that, consistent with that

precedent, they presented FERC with detailed evidence showing that the systems' history and evolution suggest a primary gathering function. But FERC did not err in according little weight to this factor. Although FERC recognized in *Enron* that the historical evolution of the pipeline system may be relevant, it has not traditionally been a criterion in the primary function test. *See ExxonMobil,* 297 F.3d at 1077. Moreover, as FERC notes, the Fifth Circuit instructed FERC to afford nonphysical factors, such as a system's historical evolution, only secondary importance. *Sea Robin,* 127 F.3d at 371. In any event, this court has observed that "the historical classification" of a system is "of limited utility" in "'the wake of major regulatory changes in the natural gas industry'" effected by Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Wellhead Decontrol,* F.E.R.C. Stats. & Regs. ¶ 30,939, *reh'g granted in part,* Order No. 636-A, F.E.R.C. Stats. & Regs. ¶ 30,950, *reh'g denied,* Order No. 636-B, 61 F.E.R.C. ¶ 61,272, 1992 WL 509683 (1992), *aff'd in part, rev'd in part sub nom. United Distrib. Cos. v. FERC,* 88 F.3d 1105 (D.C.Cir. 1996) (per curiam) ("Order No. 636"). *ExxonMobil,* 297 F.3d at 1086-87 (quoting *Conoco,* 90 F.3d at 539). For reasons we explain in Part III, this analysis applies to Transco's facilities. Thus, FERC did not err in declining to classify the lines as gathering on the basis of their historical evolution.

III.

The Producers challenge approval of the abandonment and reclassification of Transco's facilities on the grounds that FERC: (1) failed to find that a change in circumstances justified revisiting an earlier classification of Transco's facilities as gathering; (2) misapplied the reformulated primary function test; and (3) neglected to conduct a

sufficient public interest analysis. Each of these contentions lacks merit.

FERC has stated that "[e]xisting interstate pipelines and gathering facilities [will] retain their status barring some change in circumstances . . . ." *Gas Pipeline Facilities and Services on the Outer Continental Shelf,* 74 F.E.R.C. ¶ 61,222, at 61,757, 1996 WL 85454 (1996) ("*OCS Policy Statemen*"). According to the Producers, Transco requested in 1990 that FERC certificate its facilities as transmission when Transco was restructuring from a merchant to a transporter. Because FERC granted Transco's request, the Producers maintain, the *OCS Policy Statement* required FERC to find that a change in circumstances justified revisiting the certification decision.

FERC explained in the orders on review that Order No. 636, which promoted the unbundling of pipeline services, effected significant changes in the industry, and that those changes justified Transco's abandonment request. *E.g., North Padre/Central Texas Order,* 96 F.E.R.C. at 61,434. FERC noted that Transco had sought to certificate its pipelines as transmission at a time when "Transco did not have a need to precisely distinguish between jurisdictional transmission and exempt gathering facilities," because those services could be bundled. *Id.* at 61,431. But "Transco, like many interstate pipelines, found after restructuring its system consistent with Order No. 636, and moving from a bundled, merchant function to an unbundled, transportation function, that it no longer needed all of its existing system facilities." *Id.* at 61,434. FERC accordingly found that Transco's requested spindown was reasonable "because [its] facilities are no longer necessary for the service it currently provides." *Id.*

FERC's explanation is consistent with the major industry changes wrought by Order No. 636. In *ExxonMobil,* for instance, the petitioners complained that FERC failed "to give weight to the previously 'settled status' of the classification

of [the facilities in question] as engaged in jurisdictional transportation." *ExxonMobil,* 297 F.3d at 1086. But the court observed that "[w]hen interstate gas pipelines served the multi-function role of purchasing, gathering, transporting. and re-selling natural gas, *i.e.* bundled sales, the transportation/ gathering jurisdictional question may have been of less consequence." *Id.* (citation omitted). The court then explained that FERC "has been struggling with the reclassification of facilities in the wake of the unbundling of gas sales and interstate transportation in Order No. 636." *Id.* at 1087 (citing *Conoco,* 90 F.3d at 539-41). Because Order No. 636 took effect after Transco's certification, the changes effected by the Order then were sufficiently significant to justify FERC's revisiting of Transco's classifications. The Producers object that if this rationale is accepted, then all prior determinations of transmission/gathering status could potentially be reopened, thereby upsetting producers' reliance and repose interests. Even so, the objection confirms the understanding that Order No. 636 worked a substantial change in the industry; it does not provide a reason for declining to revisit Transco's certification.

Furthermore, in light of the court's upholding in *Exxon Mobil,* 297 F.3d at 1087, of FERC's modified primary function test as reasonable, the Producers' contention that FERC's orders are founded on a flawed reformulation of the primary function test necessarily fails. Similarly, the Producers' contention that FERC misapplied the primary function test by according determinative weight to the central aggregation point factor also fails. Although FERC maintains that the Producers waived this challenge by failing to raise it on rehearing, *see* 15 U.S.C. § 717r(b); *Colorado Interstate Gas,* 348 U.S. at 497-99, 75 S.Ct. at 470-71; *ASARCO,* 777 F.2d at 774-75, their argument before FERC that it erred in selecting the specific points along Transco's system where gathering ends and transmission began was sufficient to preserve the objection. While the Producers maintain that FERC erred in

finding that virtually all facilities located upstream from the central aggregation point are gathering and in failing to reconcile its conclusions with prior precedents, the orders demonstrate that FERC adequately considered a range of relevant factors—the facilities' length and diameter, the volume of gas transmitted, the pipelines' configuration, the location of compression facilities and processing plants, the source of pressure, and the presence of a central aggregation point. *North Padre/Central Texas Order,* 96 F.E.R.C. at 61,440-42; *North High Island/West Cameron Order,* 96 F.E.R.C. at 61,458- 60; *Central Louisiana Order,* 96 F.E.R.C. at 61,976-77. FERC did "not consider any one factor to be determinative," *North Padre/Central Texas Order,* 96 F.E.R.C. at 61,442, and its determinations were consistent with prior precedent. Although the Producers contend that FERC's decisions in *Seahawk Shoreline System,* 93 F.E.R.C. ¶ 61,097, 2000 WL 1610581 (2000), *reh'g denied, Seahawk Transmission Co.,* 95 F.E.R.C. ¶ 61,342, 2001 WL 744204 (2001), and *Venice Gathering Co.,* 97 F.E.R.C. ¶ 61,045, 2001 WL 1215940 (2001), are dispositive because the size of those pipelines was the same as the size of Transco's facilities, other relevant differences remain, including the systems' proximity to shore and their connections to other lines. Hence, "it is entirely appropriate for FERC to proceed on a case-by-case basis . . . ." *ExxonMobil,* 297 F.3d at 1087 (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 202-03, 67 S.Ct. 1575, 1580-81, 91 L.Ed. 1995 (1947)). FERC gave reasoned consideration to each of the pertinent factors, and its factual conclusions are supported by substantial evidence in the record. *ExxonMobil,* 297 F.3d at 1084 (citations and quotations omitted).

Producers finally contend that even if the facilities are properly classified as gathering, the NGA required FERC to make a public interest finding before permitting Transco to abandon the facilities by sale to a nonjurisdictional affiliate. *See* 15 U.S.C. § 717f(b); *Transcon. Gas Pipe Line Corp. v.*

Fed. Power Comm'n, 488 F.2d 1325, 1328 (D.C.Cir.1973) (per curiam); *Michigan Consol. Gas Co. v. Fed. Power Comm'n*, 283 F.2d 204, 214 (D.C.Cir.1960). The Producers explain that the facilities in question were certificated as transmission, and the abandonment of certificated facilities is subject to FERC's public interest standard. In a public interest analysis, "the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interest 'will in no way be disserved' by abandonment." *Transcon. Gas*, 488 F.2d at 1328 (quoting *Michigan Consol.*, 283 F.2d at 214). The Producers contend that FERC failed adequately to consider the anti-competitive effects of Transco's abandonment.

In FERC's view, "the issue of competition" is not "relevant to whether or not [FERC] will regulate an affiliated gatherer's rates or terms and conditions of service after it acquires abandoned facilities," because FERC "has no authority under the NGA to regulate a gatherer's rates or its terms and conditions of service." *North High Island/West Cameron Order*, 96 F.E.R.C. at 61,454 (citing *Conoco*, 90 F.3d 536). Put more simply, "NGA § 7(b) does not require [FERC] authorization for a transfer of gathering facilities." Respondent's Br. at 50. As the court has explained, "section 7(b) only applies to jurisdictional facilities, and 'do[es] not expand [FERC's] § 1(b) jurisdiction.'" *ExxonMobil*, 297 F.3d at 1088 (quoting *Conoco*, 90 F.3d at 553); accordingly, the petitioner in *ExxonMobil* could not use section 7(b) to "bootstrap" FERC jurisdiction over a set of gathering facilities that the petitioner sought to reclassify (but not to abandon). *Id.* Although the situation here is slightly different than in *ExxonMobil*, because Transco wishes to abandon its pipelines rather than simply reclassify them, FERC properly determined that under NGA section 7(b) it had no discretion to deny abandonment of Transco's facilities that it found were primarily functioning as gathering. *See, e.g., North*

Padre/Central Texas Order, 96 F.E.R.C. at 61,435. We part company with the Fifth Circuit's opinion in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190 (5th Cir.1997), to the extent it holds that FERC has discretion to examine whether abandonment would be in the public interest, *id.* at 1197, for once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility.

As to shippers' anti-competition concerns, FERC explained that even though it lacked the authority to deny the abandonment, the concerns were unfounded because the abandonment was "consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." *North High Island/West Cameron Order*, 96 F.E.R.C. at 61,454 (citing *Northern Natural Gas Co.*, 93 F.E.R.C. ¶ 61,101, at 61,273, 2000 WL 1610559 (2000)). FERC further noted that "the facilities at issue here are located on the OCS and will become subject to the [Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-56 (2000),] upon approval of the spindown," thereby limiting any potential anticompetitive effects. *North Padre/Central Texas Order*, 96 F.E.R.C. at 61,435. Under FERC's OCSLA regulations, WGP is required to report the terms under which it provides service to shippers; a shipper can file a complaint if it believes either Transco or WGP has violated its statutory obligations and "the Commission will investigate any such complaint in a timely manner." *Id.* (citing 18 C.F.R. § 332.2, 332.206 (2000)). Thus, FERC has taken the long view, concluding that Order No. 636's unbundling policies create competitive conditions and that, combined with the standards of conduct for gathering facilities in Transco's tariff, the OCSLA sufficiently guards against the exercise of monopoly power. *See United Distrib. Cos.*, 88 F.3d at 1139.

Accordingly, because the court is "'generally unwilling to review line-drawing performed by [FERC] unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem,'" *ExxonMobil*, 297 F.3d at 1085 (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C.Cir. 1998)), and FERC's conclusions were reasonable, we deny the petitions for review.

APPENDIX B

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Transcontinental Gas Pipe Line Corporation
Docket No. CP96-206-000

Williams Gas Processing—Gulf Coast Company, L.P.
Docket No. CP96-207-000

Order Dismissing Request for Declaratory Order and Application for Abandonment

Authorization

(Issued September 25, 1996)

Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

On February 21, 1996, Transcontinental Gas Pipe Line Corporation (Transco) filed in Docket No. CP96-206-000, an application for an order authorizing the abandonment of certain facilities located primarily offshore and onshore in Texas, Louisiana and Mississippi, by sale at net book value to its corporate affiliate, Williams Gas Processing—Gulf Coast Company, L.P. (WGP). Concurrently, WGP filed a request for an order (Petition) declaring that all of the facilities that it will acquire from Transco are nonjurisdictional gathering facilities exempt from the Commission's Natural Gas Act (NGA) jurisdiction by reason of section 1(b) of the Act. For the reasons discussed below we will dismiss Transco's abandonment application and WGP's declaratory order request.

I. Transco's Abandonment Application— Docket No. CP96-206-000

Transco proposes to "spin-down" to WGP, an affiliate, all of its offshore Gulf Coast Facilities as well as various onshore facilities, most of which are located in Texas. WGP intends to acquire and operate the transferred facilities as a non-regulated, independent business. In support of its proposal, Transco states that its principal role is that of a transporter and that it no longer requires the subject facilities to provide gas sales. Transco has determined that the services performed through the subject facilities must not only be unbundled, but also freed of Commission regulation to be able to offer the flexibility which Transco claims that as a regulated transporter it cannot.

A result of the requested abandonment would be that certain receipt and delivery points, and associated services individually certificated under section 7(c) of the NGA, also must be abandoned and rate schedules removed from Transco's tariff. Additionally, receipt points on certain firm transportation services which have been converted from certificated to blanket services (some of which are not subject to pre-granted abandonment authorization) would also be affected. Accordingly, Transco requests abandonment to the extent such authorization is necessary to remove the points from the affected rate schedules and contracts and to terminate such services or the portion of such services affected by the Application. Additionally, Transco requests that four metering and regulating facilities located in onshore Mississippi, which historically have been classified as gathering facilities, be refunctionalized to transmission. Transco is also requesting authority to abandon certain certificated interconnect receipt points which are currently inactive and are not proposed to be utilized by WGP.

II. The Subject Facilities

A. Onshore Facilities

The Tilden/McMullen Facilities consist of 450.21 miles of 2-inch to 24- inch diameter pipeline which move gas from seventy-five receipt points. Some of the gas moving through the facilities is treated to remove H2S and C02 content at the Tilden Treating Plant. Most of the gas is thereafter available for processing at the Bee County Gas Processing Plant on the McMullen Lateral. Thereafter, the McMullen Lateral continues to move gas to two 2,500 hp compressor units located at Transco's Compressor Station 30 on Transco's mainline in Wharton County, Texas.

The King Ranch Plant Facilities consist of 183.83 miles of 4-inch to 24-inch diameter pipeline which move gas from fifteen receipt points in a northeasterly direction to the vicinity of the King Ranch Processing Plant, owned and operated by Exxon Company USA, where the facilities interconnect with Transco's mainline transmission facilities or other pipelines in Kleeberg County, Texas. (WGP states that upon construction by WGP of a planned interconnect, gas moving through the facilities will be processed at the King Ranch plant.)

B. Offshore Facilities

Transco's contiguous offshore facilities include over 2,000 miles of pipeline, all of which are located in water depths less than 200 meters.

The North Padre Island Facilities consist of 93.36 miles of 10-inch to 24- inch pipeline which move gas from twelve receipt points offshore Texas in a northwesterly direction to the Padre Island separation and dehydration plant and thereafter continuing to Transco's 24-inch transmission line in Jim Wells County. The North Padre Facilities have a maximum capacity of 189,000 Mcf/day (Mcf/d).

The Central Texas Facilities consist of 434.68 miles of 6-inch to 36-inch pipeline which move gas and associated liquids from 76 receipt points onshore and offshore Texas in a northwesterly direction to the Markham separation and dehydration plant, thereafter continuing to Transco's onshore Compressor Station 30. The Central Texas Facilities have a maximum capacity of 1.1 Bcf/day (Bcf/d).

The North High Island/West Cameron Facilities consist of 251.18 miles of 2- inch to 30-inch pipeline. Some of these pipelines move gas from offshore Texas and Louisiana, in a northerly direction to a 11,490 hp compression facility at Station 44, and a separation and dehydration plant (Johnson's Bayou Plant), in Cameron Parish, Louisiana. Other parts of the facilities move gas in a northwesterly direction, commencing in offshore Louisiana up to the Cameron Meadows plant and thereafter to the Johnson's Bayou Plant for compression. The North High Island Facilities move gas from thirty-four receipt points and have a maximum capacity of 350,000 Mcf/d.

The Central Louisiana Facilities consist of 408.07 miles of 2-inch to 24-inch pipeline which move gas from one hundred and eighteen receipt points offshore Louisiana to the onshore Enron Cow Island Processing Plant, and thereafter to Egan Junction at milepost 23.62 in Acadia Parish, Louisiana. The Central Louisiana Facilities have a maximum capacity of 943,000 Mcf/d.

The Southeast Louisiana Facilities consist of 841.53 miles of 2-inch to 30-inch pipeline which move gas from 110 receipt points offshore Louisiana, in a northerly direction up to the Bayou Black Separation Plant and thereafter to the Terrebonne Processing Plant and the inlet of Transco's Station 62 in Terrebonne Parish, Louisiana. The Southeast Louisiana Facilities have a maximum capacity of over 1.5 Bcf/d.

C. Miscellaneous Onshore and Offshore Facilities

Transco also seeks to abandon: (1) thirty- seven non-contiguous segments of offshore pipe that tie-in to third-party offshore facilities; (2) 13 contiguous onshore facilities consisting of lateral lines, or groups of lateral lines, that move gas from one to eleven receipt points to either a Transco mainline or a Transco lateral trunk in Texas, Louisiana, or Mississippi, and (3) fifteen segments of non-contiguous onshore facilities that tie-in to third-party facilities in Mississippi, Louisiana, Oklahoma, New Mexico, and Texas.

Additionally Transco's application includes a number of platforms and/or dehydration units at certain locations throughout the facilities. The remaining facilities for which Transco seeks abandonment are facilities such as valves and meters that are appurtenant to the seven area specific facilities.

III. WGP's Petition—Docket No. CP96-207-000

WGP explains that the philosophy behind its plans to acquire and operate the subject facilities as non-jurisdictional gathering facilities was the determination of The Williams Companies, the parent of Transco and WGP, that Transco's "gathering" facilities should be "spun-down" and operated independently of Transco's interstate pipeline facilities. WGP contends that its acquisition and ownership of the subject facilities on a non-jurisdictional basis would be consistent with the Commission's orders clarifying the scope of its gathering jurisdiction, and is required by the section 1(b) gathering exemption of the NGA. WGP also argues that because the subject facilities are largely comprised of offshore facilities, the proposed transfer is consistent with the Commission's goals to foster development of natural gas production in the Outer Continental Shelf (OCS). WGP further asserts that in order to promote a fair competitive environment without artificial impediments to the develop-

ment of offshore reserves, the Commission should apply the "primary function" test to offshore facilities with the flexibility required by *EP Operating Co. v. FERC*,[1] and *Amerada Hess Corp.*,[2] in a manner which adequately reflects the function of the facilities and does not focus on ownership rather than form.

WGP also explains that for several of the subject facilities the proposed demarcation between gathering and transmission extends beyond processing plants or separation and dehydration facilities in order to reach areas where there are "transmission pipelines in addition to Transco". WGP contends that the inclusion of such beyond-the-plant facilities creates "stand alone .logical gathering systems' "that perform all services necessary to deliver gas to as many transmission systems as is feasible.

Specifically addressing the onshore facilities, WGP contends that their lengths and diameters support a finding of gathering because the pipelines range in size from 2-inches to 24-inches in diameter, most of the lines are smaller than 12-inches in diameter, and the larger diameter segments are required to move larger volumes to processing plants. WGP claims that the other elements of the "primary function" test also indicate a gathering function. WGP avers that: (1) The Tilden/McMullen and King Ranch facilities are located primarily behind processing plants and are primarily "network-like" on the upstream ends with larger spines further downstream; (2) The 103 mile portion of the Tilden/McMullen facilities extending beyond the processing plant is necessary because it is connected to 25 receipt points, the final stage of field compression is located at its terminus, and it creates a "logical gathering system"; (3) Of the onshore facilities, only the Tilden/McMullen facilities include

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[1] 876 F.2d. 46 (5th Cir. 1989).

[2] 52 FERC P 61,268 (1990).

compression—2400 hp to move gas through the treatment plant and 5,000 hp at the terminus to boost gas into Transco's transmission system; (4) Wells "are generally dispersed" throughout the Tilden/McMullen and King Ranch facilities; and (5) the Tilden/McMullen facilities operate at wellhead pressures ranging between 600 and 750 psi and the King Ranch facility operates at pressures between 700 and 850 psi.

Respecting the non-contiguous onshore facilities WGP states that they are directly connected to wells and are "small gathering lines".

Respecting the offshore facilities, WGP generally argues that they are gathering facilities because they are comprised of numerous segments of pipeline used to move gas from production platforms to processing and transmission systems onshore. WGP maintains that diameters of the offshore facilities, generally between 2-inches to 30-inches, are consistent with gathering facilities. Specifically addressing the 36-inch diameter of some of the looped pipelines comprising the "spine" of the Central Texas facilities, WGP argues that diameter, alone, should not preclude a finding of gathering on the OCS where there are operational needs for larger diameter pipeline. WGP also asserts that the total pipeline mileage of the offshore facilities is due to the various "smaller" segments required to connect to production and to move production to onshore processing and transmission consistent with other offshore gathering systems. WGP further contends that prior to Sea Robin Gas Pipeline Co. (Sea Robin),[3] the overall size of a system has never been a determining factor and, in any event, there are significant differences between its offshore facilities and those in Sea Robin.

WGP also maintains that the geographic configuration of the offshore facilities is consistent with a gathering function because they are generally arranged in a "network-like"

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[3] 71 FERC P 61,351 (1995), *reh'g denied* 75 FERC P 61,332 (1996).

pattern and many of the facilities are arranged in the shape of an inverted "Y". WGP also states that there are 289 receipt points connected to its offshore facilities and that the "wells are often dispersed throughout" the facilities except where there is a length of pipeline necessary to deliver gas from offshore wells to onshore processing or transmission lines.

WGP also contends that the location of compressors and processing plants confirms the offshore facilities' gathering function and expresses its disagreement with the Commission's statements in Sea Robin that the location of processing facilities is of little relevance in determining the primary function of offshore pipeline facilities. WGP states that all of the offshore facilities are located behind processing plants, except for three beyond-the-plant extensions (North Padre Island facilities—4 miles, Central Texas facilities—24 miles, Central Louisiana facilities—26 miles). WGP maintains that these beyond-the-plant facilities are merely relatively short extensions incidental to processing which create "logical gathering systems" and which also in the case of the Central Texas and Central Louisiana facilities connect to additional production.

WGP further claims that the amount of compression on the offshore facilities is also consistent with gathering. WGP states that except for the North High Island/West Cameron facilities, which includes a 11,490 hp final stage compressor station, there is no compression on the offshore facilities except for minor "production-related" platform compression or separation related "flash gas" compression. WGP further states that the operating pressures of its offshore facilities "are for the most part related to the pressures at which the gas is produced" and range 675—1300 psi.

IV. Notice and Interventions

Following due notice by publication in the Federal Register (61 Fed. Reg. 8607, March 5, 1996) the 118 parties listed in

appendix A filed timely motions to intervene in Docket No. CP96-206-000 and the 89 parties listed in appendix B filed timely motions to intervene in Docket No.CP 96-207-000.[4] In addition, the 13 persons listed in appendix C filed motions to intervene out of time in Docket No. CP96-206-000 and the 16 persons listed in appendix D filed motions to intervene out of time in Docket No. CP96-207-000. For good cause shown and because it will not delay these proceedings or prejudice any party to it, we will grant these motions.

The 23 parties listed in appendix C filed protests to or comments on Transco's Application and WGP's Petition. Among the issues/ concerns raised are: (1) the consistency of the proposed "spin-down" with the proper application of the "primary function" test and the Commission's recent Statement of policy respecting pipeline facilities on the OCS;[5] (2) the impact of the proposed "spin-down" on Transco's transportation rates; (3) the possibility of "rate stacking"; (4) the potential impact of unregulated "gathering" rates; (5) the consistency of WGP's Petition and Sea Robin; (6) alleged contradictions between assertions made by Transco in this proceeding and other Transco proceedings respecting the function of the subject facilities; and (7) the impact of the proposed "spin-down" on the Commission's goals of promoting open access and competition.

In addition, several parties requested a technical conference or hearing and the Producer Coalition filed a motion to sever and dismiss as to Transco's offshore facilities. Subsequently,

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[4] Timely, unopposed motions to intervene are granted pursuant to rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214 (1994).

[5] Gas Pipeline Facilities and Services on the Outer Continental Shelf=Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act (Policy Statement), 74 FERC P 61,222 (Feb. 28, 1996).

Transco and WGP filed answers to the protests and motions. Several parties filed replies to these answers.[6]

V. Discussion

In their pleadings in this case Transco and WGP are asking the Commission to rescind the exercise of NGA jurisdiction over extensive offshore and onshore transmission facilities that have been regulated for twenty or more years, on which regulation producers and other shippers have relied in making long-term business decisions and commitments of capital. Moreover, a decision to grant the requested abandonment in this case could set a precedent for ending NGA jurisdiction on the OCS, as it is likely that virtually every similar interstate pipeline on the OCS then would file a similar application. It is within this context that Transco's Application and WGP's Petition must be assessed.

The proposal before the Commission in this proceeding represents a very significant effort by a major interstate pipeline to sever its integrated pipeline facilities into two large parts, one jurisdictional and the other nonjurisdictional. Under the proposal, Transco would retain and operate the main trunk of the system that runs from Texas to New York. All branch pipeline facilities that feed the trunk, including i) facilities physically and operationally integrated with Transco, ii) facilities physically separated from Transco's system, and iii) the entirety of Transco's OCS pipeline facilities, would be transferred to WGP, which would operate them as an unregulated "gathering" company. The potential impact of the proposal is heightened by the fact that

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[6] Because they will provide for a more complete record in this proceeding, we will waive rule 213 of the Commission's rules of practice and procedure and allow the answers, replies, and other supplemental pleadings that have been filed in these proceedings.

Transco owns and operates more miles of interstate pipeline on the OCS than any other interstate pipeline or producer.[7]

If the proposal were approved in its entirety, all gas volumes connected to the Transco system in the Gulf of Mexico and nearby onshore areas would be forced to pass through facilities owned and operated by a nonjurisdictional affiliate before the gas could gain access to Transco's jurisdictional facilities. In addition, Transco proposes to transfer to WGP certain pipeline segments that extend downstream from processing plants so that gas previously tendered to Transco at such plants will be required to pass through the unregulated WGP facilities before it reaches Transco.

The combination of large onshore and extensive offshore facilities included in Transco's Application is without precedent in prior "spin-down" cases.[8] Transco has consolidated in one application pipeline comprising the entirety of its offshore facilities, as well as essentially all of its onshore pipeline facilities in its production area zones other than

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[7] Transco owns 11.7% of all such pipeline in the Gulf of Mexico federal waters. Gulf of Mexico Natural Gas Resources and Pipeline Infrastructures, Foster Associates (1996), p. 27.

[8] The Commission has in at least one case been requested to address the jurisdictional status of an offshore system which included some onshore facilities. However, unlike the facilities included in Transco's proposal, this system was a relatively small, geographically discrete system. *See* Superior Offshore Pipeline Co., 67 FERC P 61,253 (1994) [Facilities made up of 118 miles of 12-inch to 24-inch. pipeline determined to be gathering]. Moreover, even when viewed in isolation from the onshore component, the collection of offshore facilities included in Transco's application is unprecedented. Transco's offshore facilities include over 2,000 miles of pipeline. Prior to the instant proceeding, the largest collection of OCS facilities the Commission has been asked to consider was Sea Robin's 438 miles of pipeline which the Commission determined to be jurisdictional transmission facilities. *See Sea Robin, supra.*

certain mainline facilities. The physical parameters of the subject facilities are massive and complex, involving over 3,100 miles of pipeline in multiple segments located onshore in five states, in the OCS and in state waters. Although some of the subject facilities, or isolated segments, may qualify as gathering facilities under the "primary function" test, based upon the record in these proceedings as it stands, we cannot declare, as WGP has requested, that all of the facilities are gathering facilities.

In our view, WGP has not demonstrated that the facilities meet the physical criteria of the "primary function' test, at least because the facilities include substantial segments of large diameter pipeline that move gas over relatively long distances.[9] Moreover, some of these segments are looped with large capacity pipeline.[10] It also appears that some of the facilities span significant distances without picking up

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[9] It is clear that the scope of Transco's proposal goes far beyond any previous request for reclassification of facilities from transmission to gathering. The facilities include more than 1,360 miles of pipeline with diameters of 20 inches or greater. Over 70% of the 435 miles of pipe comprising Transco's Central Texas Facilities have diameters of 20 inches or greater and almost 50% of the pipe is 24-inches in diameter or greater. In addition, the facilities include 121.64 miles of 30-inch and 55.69 miles of 36-inch line. Over 50% of the 841 miles of pipe comprising Transco's Southeast Louisiana Facilities have diameters of 20-inches or greater, including 71.92 miles of 30- inch diameter line. Over 50% of the pipe comprising the Central Louisiana is 16-inches in diameter or greater. Over 95% of the 93 miles of pipe comprising the North Padre Island Facilities is 20-inches in diameter or greater.

[10] Transco's Central Texas Facilities include the following segments of looped line: approximately 40 miles of 30 and 20-inch looped line; approximately 56 miles of 30-inch and 36-inch looped line; and approximately 24 miles of 14-inch and 36-inch looped line which extends beyond the Markham plant. The Southeast Louisiana Facilities include approximately 31 miles of looped 20-inch and 24-inch line. The North High Island Facilities include more than 45 miles of the 24 inch line looped with 10-inch and 16-inch diameter line.

significant, if any, volumes of gas.[11] In addition, some of the facilities extend beyond processing plants.[12] Especially in light of the limitations on gathering pipeline size, as well as the other considerations discussed in the Commission's decision in *Sea Robin*,[13] the Commission believes that WGP has not adequately explained how such existing interstate pipeline facilities that are not located in deep OCS waters, i.e., waters in excess of 200 meters, can properly be reclassified as gathering lines under the "primary function" test. At the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities.

Finally, we note that the Commission's recent Policy Statement respecting pipeline facilities on the OCS recognized the existence of an existing interstate pipeline infrastructure in shallow OCS waters.[14] It is a historical fact that starting in the 1960's most major interstate pipelines in the Gulf Coast region extended their facilities onto the OCS in the Gulf of Mexico to connect and transmit gas supply to their customers in markets located throughout the eastern half of the United States. These systems constituted major additions to the existing interstate pipeline network, were dominated by facilities 16 to 36 inches in diameter, and were designed and operated to carry gas from OCS locations throughout the interstate pipeline grid. These systems were

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[11] While neither Transco nor WGP included maps clearly showing the precise location of wells connected to the facilities, the main trunk of the North Padre Island facilities is a 70 mile-long 24-inch diameter line that has no apparent well connections along its length, and extends over 4 miles beyond the North Padre Island processing plant.

[12] For example, the Tilden/McMullen facilities include an approximately 152 mile-long, 24-inch diameter line which extends approximately 103 miles beyond the Bee County processing plant. Throughout these 103 miles, it appears that the line picks up gas at only three points.

[13] *Supra.*

[14] Policy Statement, *supra* at pp. 61,757-759.

built and operated by companies principally engaged in the business of purchasing, transporting, and reselling gas in interstate commerce, and were presented to and certificated by the Commission as interstate transportation facilities. Respecting the jurisdictional status of existing interstate pipelines, such as Transco, the Policy Statement stated that "[e]xisting interstate pipelines and gathering facilities would retain their status barring some change in circumstances." [15]

In view of the considerations discussed above, we cannot conclude that the pleadings of Transco and WGP have clearly demonstrated it would be in the public convenience and necessity to grant Transco's application for abandonment or that there is sufficient cause for the Commission to find that the jurisdictional status of all of the facilities to be transferred to WGP should be changed from transmission to gathering. Neither Transco nor WGP included in their pleadings an alternative request that the Commission find specific parts of the facilities to be declared nonjurisdictional. Accordingly, Transco's application and WGP's petition are dismissed. The dismissal is without prejudice, however, to Transco's and WGP's filing another proposal requesting that the Commission consider discrete portions of the facilities which were the subject of instant proceedings to be gathering, upon which all interested persons will have the opportunity to comment.

The Commission orders:

(A) The application for abandonment authorization filed by Transco in Docket No. CP96-206-000 is dismissed.

(B) The petition for a declaratory order filed by WGP in Docket No. CP96-207-000 is dismissed.

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[15] Policy Statement, *supra* at p. 61,757.

Appendix A

Intervenors—Docket No. CP96-206-000

Amerada Hess Corporation

Amoco Production Company

Anadarko Petroleum Corporation

ANR Pipeline Company

Aquila Energy Marketing Corporation

Ashland Exploration, Inc.

Atlanta Gas Light Company

Baltimore Gas and Electric Company

Blue Dolphin Exploration Company

Brooklyn Union Gas Company

Chevron U.S.A., Inc.

CNG Energy Services Corporation

CNG Producing Company

CNG Transmission Corporation

Coastal Eagle Point Oil Company

Columbia Gas Transmission Corporation

Commonweatlh Gas Services Inc.

Conoco Inc.

Consolidated Edison Company of New York, Inc.

Delhi Gas Pipeline Corporation

East Ohio Gas Company

Enron Capital and Trade Resources Corporation

Enron Louisiana Energy Company

Exxon Corporation

Fina Natural Gas Company

Florida Gas Transmission Company

Gasdel Pipeline System, Inc.

GPM Gas Corporation

Frederick W. Peters, Esq.

High Island Offshore System

Independent Petroleum Association of America

John H. Young, Inc.

Koch Gateway Pipeline Company

Leviathan Gas Pipeline Company

Liquid Energy Corporation

Long Island Lighting Company

Louisiana Land and Exploration Company

Market Hub Partners, Inc.

Mobil Natural Gas Inc.

Municipal Gas Authority of Georgia

National Fuel Gas Distribution Corporation

Natural Gas Clearinghouse

Natural Gas Pipeline Company of America

New Jersey Natural Gas Company

New York Public Service Commission

Newfield Exploration Company

Niagara Mohawk Power Corporation

Noram Gas Transmission Company

North Carolina Natural Gas Corporation

Northeast Energy Associates

Northern Natural Gas Company

NUI Corporation

Owens-Corning Fiberglass Corporation

Oxy USA Inc.

PanEnergy Field Services, Inc.

PanEnergy Trading & Marketing Services, LLC

PECO Energy Company

Penn Fuel Gas, Inc.

Pennzoil Exploration & Production Co.

PG Energy Inc.

Philadelphia Gas Works

Phillips Petroleum Company

Piedmont Natural Gas Company, Inc.

Pogo Producing Company

Process Gas Consumers Group

Producer-Marketer Transportation Group

Public Service Company of North Carolina

Public Service Electric and Gas Company

City of Richmond

Rochester Gas & Electric Corporation

Sea Robin Pipeline Company

Seagull Marketing Services, Inc.

Shell Offshore, Inc.

South Carolina Pipeline Corporation

South Jersey Gas Company

Southern Company Services, Inc.

Southern Natural Gas Company

Star Enterprise

Sun Company, Inc.

Superior Natural Gas Corporation

Tenneco Energy Inc.

Texaco Natural Gas Inc.

Texas Eastern Transmission Corporation

Total Minatome Corporation

TPC Corporation

Transco Municipal Group

Transcontinental Gas Pipe Line Corporation

Trunkline Gas Company

U-T Offshore System

UGI Utilities, Inc.

UMC Petroleum Corporation

Union Oil Company of California

Union Pacific Fuels, Inc.

Valero Gas Marketing, L.P.

Valero Transmission, L.P.

Vastar Gas Marketing, Inc.

Virginia Natural Gas, Inc.

Washington Gas Light Company

Appendix B

Intervenors—Docket No. CP96-207-000

Amerada Hess Corporation

Amoco Production Company

Anadarko Petroleum Corporation

ANR Pipeline Company

Aquila Energy Marketing Corporation

Ashland Exploration, Inc.

Atlanta Gas Light Company

Baltimore Gas and Electric Company

Blue Dolphin Exploration Company

Blue Dolphin Pipeline Company

Brooklyn Union Gas Company

Chevron U.S.A., Inc.

CNG Energy Services Corporation

CNG Producing Company

CNG Transmission Corporation

Coastal Eagle Point Oil Company

Columbia Gas Transmission Corporation

Commonweatlh Gas Services Inc.

Conoco Inc.

Consolidated Edison Company of New York, Inc.

Delhi Gas Pipeline Corporation

East Ohio Gas Company

Enron Capital and Trade Resources Corporation

Enron Louisiana Energy Company

Exxon Corporation

Fina Natural Gas Company

Florida Gas Transmission Company

Gasdel Pipeline System, Inc.

GPM Gas Corporation

High Island Offshore System

Independent Petroleum Association of America

John H. Young, Inc.

Koch Gateway Pipeline Company

Liquid Energy Corporation

Louisiana Land and Exploration Company

Market Hub Partners, Inc.

Mobil Natural Gas Inc.

Municipal Gas Authority of Georgia

National Fuel Gas Distribution Corporation

Natural Gas Clearinghouse

Natural Gas Pipeline Company of America

New Jersey Natural Gas Company

New York Public Service Commission

Newfield Exploration Company

Niagara Mohawk Power Corporation

Noram Gas Transmission Company

North American Resources Company

North Carolina Natural Gas Corporation

Northeast Energy Associates

Northern Natural Gas Company

NUI Corporation

Owens-Corning Fiberglass Corporation

Oxy USA Inc.

PanEnergy Field Services, Inc.

PanEnergy Trading & Marketing Services, LLC

Pennzoil Exploration & Production Co.

Philadelphia Gas Works

Phillips Petroleum Company

Piedmont Natural Gas Company, Inc.

Pogo Producing Company

Producer-Marketer Transportation Group

Public Service Company of North Carolina

Public Service Electric and Gas Company

City of Richmond

Sea Robin Pipeline Company

Seagull Marketing Services, Inc.

Shell Offshore, Inc.

South Carolina Pipeline Corporation

South Jersey Gas Company

Southern Natural Gas Company

Star Enterprise

Sun Company, Inc.

Superior Natural Gas Corporation

Teleco Oilfield Services Inc.

Tenneco Energy Inc.

Texaco Natural Gas Inc.

Texas Eastern Transmission Corporation

Total Minatome Corporation

TPC Corporation

Transco Municipal Group

Trunkline Gas Company

U-T Offshore System

UMC Petroleum Corporation

Union Oil Company of California

Union Pacific Fuels, Inc.

Valero Gas Marketing, L.P.

Valero Transmission, L.P.

Vastar Resources, Inc.

Virginia Natural Gas, Inc.

Appendix C

Late Intervenors—Docket No. CP96-206-000

ANR Pipeline Company

Aquila Energy Marketing Corporation

Commonwealth Gas Services Inc.

Fina Natural Gas Company

Leviathan Gas Pipeline Company

Louisiana Land and Exploration Company

Newfield Exploration Company

Producer Coalition

Pogo Producing Company

Process Gas Consumers Group

South Jersey Gas Company

Total Minatome Corporation

UMC Petroleum Corporation

Appendix D

Late Intervenors—Docket No. CP96-207-000

ANR Pipeline Company

Aquila Energy Marketing Corporation

Commonwealth Gas Services Inc.

Delhi Gas Pipeline Corporation

Fina Natural Gas Company

Leviathan Gas Pipeline Company

Louisiana Land and Exploration Company

Newfield Exploration Company

North American Resources Company

Philadelphia Gas Works

Pogo Producing Company

Process Gas Consumers Group

Producer Coalition

South Jersey Gas Company

Total Minatome Corporation

UMC Petroleum Corporation

APPENDIX C

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Docket No. CP96-206-001
Docket No. CP96-207-001

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing—Gulf Coast Company, L.P.

ORDER DENYING REHEARING
(Issued June 14, 2001)

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, and Linda Breathitt.

On September 25, 1996, the Commission issued an order addressing a request by Transcontinental Gas Pipe Line Corporation (Transco), in Docket No. CP96-206-000, for permission and approval to abandon a massive and complex collection of facilities, pursuant to section 7(b) of the Natural Gas Act (NGA),[1] and a request by Williams Gas Processing—Gulf Coast Company, L.P. (Williams), in Docket No. CP96-207-000, for a Commission finding that these facilities would, following transfer to Williams, be gathering facilities exempt from the Commission's NGA jurisdiction under NGA section 1(b). The Commission dismissed both applications because Transco and Williams did not include in their pleadings any basis upon which the Commission could reach either the requested finding that all of the facilities were gathering, or alternatively, a finding that particular portions of

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[1] 76 FERC ¶ 61,317 (1996).

the facilities were gathering. Transco and Williams jointly request rehearing of the September 1996 order, contending the Commission erred in not finding that gathering is the primary function of all of the facilities at issue.

We will deny the parties' request for rehearing, for the reasons discussed below.

Background

In Docket No. CP96-206-000, Transco sought authorize-ation to abandon all of its facilities located offshore in the Gulf of Mexico and to abandon certain onshore facilities located primarily along the Texas coast. Transco proposed to "spin down" these certificated facilities and associated services by transfer to its affiliate Williams.

Williams filed a petition, in Docket No. CP96-207-000, requesting that the Commission declare that the facilities Transco proposed to abandon by transfer would be gathering facilities following Williams' acquisition and thereby be exempt from the Commission's NGA jurisdiction.

The facilities at issue are massive and complex, encompassing approximately 3,200 miles of 2- to 36-inch pipe located onshore in five states and offshore in state and federal waters, compressor stations, and gas treatment plants. The facilities are described in detail in Transco's application, Williams' petition, and in the September 1996 order.

In order to determine whether a facility performs primarily jurisdictional transmission or nonjurisdictional gathering, the Commission considers various physical and geographic characteristics of the facility.[2] In the September 1996 order,

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[2] In Farmland Industries, Inc., (Farmland), 23 FERC ¶ 61,063 (1983), the Commission enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the length and diameter of the facility, (2) the extension of the facility beyond the central point in the field, (3) the facility's geographic

the Commission observed that "[a]lthough some of the subject facilities, or isolated segments, may qualify as gathering facilities under the 'primary function' test," the facilities contained "substantial segments of large diameter pipeline that move gas over relatively long distances," i.e., facilities which clearly serve to transport gas in interstate commerce. Therefore, the Commission could not find, as requested, that all of the facilities qualified as gathering.

Neither Transco nor Williams included in their pleadings an alternative request to permit the Commission to reach a finding that anything less than every one of the facilities presented was gathering. Consequently, upon finding that portions of Transco's facilities were transporting gas in interstate commerce, the Commission dismissed the parties' request to find that all of the facilities were gathering. The Commission did so without prejudice, observing that Transco and Williams retained the option of filing another proposal requesting the Commission consider whether discrete portions of the facilities may be engaged primarily in gathering.[3]

Transco's and Williams' Joint Request for Rehearing

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configuration, (4) the location of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures. In additional to these physical and geographic criteria, the Commission also considers the purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act.

[3] The parties have done so in separate proceedings in Docket Nos. CP01- 32-000 and CP01-33-000, in Docket Nos. CP01-102- 000 and CP01-103-000, and in Docket Nos. CP01-368 and CP01-369- 000, proceedings in which Transco seeks abandonment approval and Williams requests a declaration of nonjurisdictional status for fractions of the whole of the facilities at issue here. However, in their request for rehearing in the instant docket, the parties do not seek to parse the Transco facilities; rather, they continue to insist that the Commission should find all the facilities at issue to be gathering.

Transco and Williams request rehearing on the grounds that the Commission did not properly apply its primary function test to Transco's facilities, placed undue reliance on policy considerations in reaching its conclusion, failed to follow its 1996 Policy Statement concerning the primary function of facilities located offshore,[4] and failed to recognize that its policy aims could be realized absent NGA oversight by exercising its authority under the Outer Continental Shelf Lands Act (OCSLA).[5]

In assessing the primary function of Transco's facilities, Transco and Williams claim that the Commission failed to properly apply the "sliding scale which will allow the use of gathering pipelines of increasing length and diameters," described in Amerada Hess Corporation (Amerada Hess),[6] to Transco's offshore facilities. In addition, the parties contend that the Commission "decided to ignore the behind-the-plant factor because, for policy reasons, it does not like the result it would dictate." [7] The parties believe this constitutes disparate treatment in the application of the primary function test to Transco's offshore facilities and other onshore systems. The parties argue the Commission should treat the OCS as a producing area, and recognize that large offshore facilities function similarly to smaller onshore facilities located in an onshore producing field. They assert that the Commission has applied its primary function test inconsistently by finding smaller "piecemeal systems" to be gathering, while refusing to do the same for Transco's larger integrated facilities.

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[4] Gas Pipeline Facilities and Services on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 (Feb. 28, 1996), *reh'g dismissed*, 75 FERC ¶ 61,219 (1996).

[5] 43 UCS §§ 1301-1356.

[6] 52 FERC ¶ 61,268 at 61,988 (1990).

[7] Transco's and Williams' Request for Rehearing, at 27 (October 25, 1996).

Transco and Williams assert that to assess the primary function of a facility, the Commission should properly concern itself with that facility's physical features. They charge that in this case the Commission improperly placed undue emphasis on non-physical features, such as the facilities' historic jurisdictional classification, Transco's shippers' reliance on the protections provided by NGA regulation, and the potential to open a regulatory gap absent NGA jurisdiction and thereby permit affiliate abuse and/or the exercise of market power.

Transco and Williams argue that the historic designation and certification of facilities should not be taken as evidence of facilities' function, a position the parties assert the Commission has previously endorsed.[8]

In the September 1996 decision, the Commission noted the facilities in question had been constructed by companies principally engaged in the business of purchasing, transporting, and reselling gas in interstate commerce and were operated by Transco, a company engaged principally in the transportation of gas in interstate commerce. Transco and

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[8] Transco and Williams quote El Paso Natural Gas Company, 72 FERC ¶ 61,219 at 62,002 (1995), in which the Commission observed that:

> Under [a] bundled sales regulatory environment, the gathering/transmission function distinction was not as important as it is in a post-Order No. 636 environment. Therefore, traditionally, when a pipeline applied for a certificate to construct facilities, the Commission did not inquire into the pipeline's prospective use of the facilities before issuing the certificate. Consequently, many facilities that actually perform a gathering function originally were constructed under NGA section 7 certificates. [Footnote omitted.] Similarly, in past rate proceedings, the Commission also did not apply the primary function test prior to determining how a pipeline would functionalize the facilities in its tariff for rate treatment purposes. Therefore, until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined.

Williams object to this focus on the business purpose of the present owner of the facilities, i.e., Transco, contending that in other abandonment cases the Commission has looked to the business purpose of the prospective owner of the facilities to be abandoned, i.e., Williams.[9]

Transco and Williams believe the Commission erred by taking market power and competitive considerations into account in assessing the primary function of Transco's facilities. For example, the parties maintain that the fact that following abandonment Williams, Transco's NGA-exempt affiliate, will control access to Transco's mainlines should be immaterial to the Commission's contemplation of Transco's facilities' primary function. The parties insist any concerns regarding affiliate abuse or market power can be addressed separately following transfer. They observe that the Commission has rejected such concerns as criteria for determining whether specific facilities are performing primarily transportation or gathering.[10] The parties add that such concerns have no relevance offshore, since even absent NGA oversight, the OCSLA stands ready to ensure open and nondiscriminatory access.

Transco and Williams claim that unbundling in the wake of Order No. 636 has led to facilities formerly used to provide bundled sales service being reclassified as gathering and that Transco, by seeking to abandon facilities no longer used to provide jurisdictional services, is acting in conformity with the Commission's directed restructuring. Thus, they argue it "defies reason" for the Commission to expect a pipeline

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[9] Citing Williams Natural Gas Company, 68 FERC ¶ 61,100 at 61,558 (1994) and Arkla Gathering Services Company, 67 FERC ¶ 61,257 at 61,867 (1994).

[10] Citing El Paso Natural Gas Company, 72 FERC ¶ 61,220 at 62,013-14 (1995) and Mid Louisiana Gas Company, 67 FERC ¶ 61,255 at 61,850-51 (1994).

company to abandon facilities no longer used for certificated service at the same time that the Commission resists approving such abandonment because of shippers' reliance on NGA oversight of the now-nonjurisdictional service that the pipeline provides. The parties believe such an approach thwarts the pro-competitive unbundling that Order No. 636 sought to bring about.

Transco and Williams stress that the Commission, when presented with a question of jurisdiction, can and should reach resolution by straightforward reference to the specific facts at hand, and should not, as it did in its September 1996 order, permit its consideration of the facts to be colored by reflections upon the potential precedential impacts of its decision. The parties allege that in this case, the Commission "identified the conclusion it wanted to reach, for policy reasons alone" prior to entering into its primary function analysis. They believe that the Commission's decision was motivated by "the overriding objective of its new [1996 Policy Statement], i.e., entrenching the status quo for existing OCS facilities." [11]

Transco and Williams describe the September 1996 order as "unprecedented, arbitrary and erroneous" for applying the Commission's primary function test, as modified to apply offshore, to Transco's onshore facilities.

Transco and Williams imply that were the Commission to forego "piecemeal NGA regulation" over offshore facilities—e.g., by declaring all offshore facilities to be gathering—and instead rely exclusively on its jurisdiction under the OCSLA, this would provide for a more comprehensive and uniform regulatory regime, and thereby promote the orderly and rational development of offshore resources.

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[11] Transco's and Williams' Request for Rehearing, at 3-4 (Oct. 25, 1996).

Commission Response

Transco and Williams are correct that the Commission did not undertake an exacting application of every one of the Farmland factors to every one of the multiple facilities that Transco seeks to abandon. We determined, however, that there was no need to so exhaustively examine the facilities at issue. As explained in the September 1996 order, Transco sought abandonment approval on an all-or-nothing basis. Thus, upon the Commission's finding a portion of Transco's approximately 3,200 miles of 2- to 36-inch pipeline system to be primarily transporting gas in interstate commerce, we logically had to and did dismiss the parties' request for abandonment authorization, since they had made it contingent on the Commission's also finding that each and every one of facilities can qualify as gathering.

In our September 1996 order, we dismissed the parties' requests without prejudice, observing that although certain of Transco's pipelines were clearly transmission, this was not necessarily the case for all. Accordingly, we invited the parties to review Transco's extensive set of facilities with an aim to distinguishing sections or segments that might be performing primarily gathering, and then return with a refined abandonment application limited to this subset of gathering lines.[12]

Transco and Williams contend we did not properly apply the Farmland factors; in particular, that we did not apply the primary function test as modified in Amerada Hess for facilities located offshore.[13] The parties point out, properly,

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[12] *See* note 3.

[13] As a corollary, Transco and Williams charge we improperly applied our primary function test, as modified for offshore facilities, to Transco's onshore facilities. While we did note characteristics of certain of the onshore facilities, we did not hold these facilities up to examination under criteria applicable to offshore systems. As the parties suggest, it would not

that in Amerada Hess we effectively expanded the size of facilities that could qualify as gathering when located offshore. However, the "sliding scale" introduced in Amerada Hess is bounded by the incrementally expanding length and diameter of pipelines employed to reach to offshore frontier production areas. The vast majority of Transco's existing offshore facilities do not appear to qualify as lines that serve to access gas extracted from frontier prospects; i.e., Transco's facilities' size does not appear to be a product of the "changing technical and geographic nature of exploration and production" offshore. Consequently, we question the suitability of employing an expanded sliding scale, as set forth in Amerada Hess, as the measure of the size of Transco's lines.

When measured against other facilities found to be gathering, Transco's facilities loom large. Transco seeks gathering status for more than 1,360 miles of pipe with diameters of 20 inches or greater. For example, of the 435 miles of pipelines comprising Transco's Central Texas system, over 70 percent is 20- inches or more in diameter, with almost 50 percent 24 inches in diameter or more. These facilities include 121.64 miles of 30-inch and 55.69 miles of 36- inch line. In addition, segments of the Central Texas system effectively expand these already large diameters by running parallel lines; these portions include approximately 40 miles of 30 and 20-inch looped line, 56 miles of 30- and 36- inch looped line, and 24 miles of 14- and 36- inch looped line. Transco's Southeast Louisiana facilities contain 841 miles of pipe, over half of which is 20 inches or more in diameter, including over 70 miles of 30-inch pipe;

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have been consistent with Commission policy to examine onshore facilities using the Amerada Hess standard applicable to offshore facilities, since the application of the Amerada Hess modifications to the primary function test permit larger and higher pressure facilities to be found to be gathering for reasons unique to conditions offshore.

approximately 31 miles of 20- and 24-inch pipe is looped. Transco's North Padre Island system consists of 93 miles of pipe, over 95 percent of which is 20- inches or more in diameter.

Although the September 1996 order placed emphasis on the large size of certain of Transco's facilities, that order also found that these large facilities "move gas over relatively long distances," that "[i]t also appears that some of the facilities span significant distances without picking up significant, if any, volumes of gas," and finally that "some of the facilities extend beyond processing plants." [14] For example, we found that "the main trunk of the North Padre Island facilities is a 70 mile-long, 24-inch diameter line that has no apparent well connections along its length, and extends over 4 miles beyond the North Padre Island processing plant." [15] Also, we found that "the Tilden/McMillen facilities include an approximately 152 mile-long, 24-inch diameter line which extends approximately 103 miles beyond the Bee County processing plant. Throughout these 103 miles, it appears that the line picks up gas at only three points." [16] In view of such segments among its system's facilities, we concluded that Transco and Williams had "not adequately explained how such existing interstate pipeline facilities that are not located in deep OCS waters, i.e., waters

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[14] 76 FERC ¶ 61,317 at 62,542-43. Footnotes omitted. This fuller contemplation of Farmland factors is particularly pertinent in light of the decision in *Sea Robin Pipeline Company v. FERC*, 127 F.3d 365 (5th Cir. 1997) (*Sea Robin*), in which the court cautioned the Commission against placing undue weight on any single factor, such as size, to determine a facility's primary function. That was not the case here, since as noted, in addition to certain facilities' large size, we found other Farmland factors also demonstrated that these large facilities' primary function was characteristic of transmission.

[15] *Id.*, note 11, at 62,543.

[16] *Id.*, note 12.

in excess of 200 meters, can properly be reclassified as gathering lines under the 'primary function' test. At the very minimum, large portions of the facilities are clearly properly classified as jurisdictional transmission facilities." [17]

We find no argument to persuade us that this determination was in error. We believe our assessment of the Farmland factors was sufficient to reach a finding that certain of Transco's facilities are transporting gas. Further, we believe our reasoning and conclusion are consistent with our past practice in applying our primary function test. Accordingly, we affirm our September 1996 finding that at least one of Transco's numerous pipeline facilities is performing primarily interstate transportation.

Since the September 1996 order, we have altered the application of our primary function test for facilities located offshore. We have observed that onshore the presence of a gas processing plant can generally be taken to demarcate a point at which gathering ends and transportation begins, whereas offshore the location of a processing plant (situated, typically, on or near shore) is largely driven by physical and financial constraints. We have consequently concluded that the behind-the-plant factor is not necessarily determinative of offshore facilities primary function.[18] In addition, we consider whether an offshore system's configuration contains a central point of aggregation, i.e., a point where small lines carrying gas from various wells converge and deliver their collective volumes into a single large line for transport to shore.[19]

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[17] *Id.* Footnote omitted.

[18] *See Sea Robin*, 76 FERC ¶ 61,317 (1999) (*order on remand*), *order denying reh'g*, 87 FERC ¶ 61,384 (2000).

[19] *Id.*

In our September 1996 order, we did not explicitly adapt our primary function analysis in accordance with these subsequent modifications to our test. However, our determination that certain of Transco's offshore facilities are properly classified as jurisdictional transmission did not turn on those facilities' location upstream of onshore processing plants. Further, although we did not seek to identify aggregation points on Transco's offshore lines, the presence of such points, while potentially diminishing the amount of Transco pipe deemed transmission, would nevertheless also serve to highlight the status of some remaining quantity of offshore pipeline that is transporting aggregated gas to shore, and is thereby NGA jurisdictional transmission pipeline. Therefore, we do not believe that reconsideration of Transco's facilities under our primary function test (as it was in 1996 or as it is today) would change our finding that some portion of Transco's facilities are primarily performing jurisdictional transmission.

In the September 1996 order, we speculated upon the potential consequences of finding all of Transco's facilities to be gathering and this speculation extended to the policy implications of such a finding. However, our recognition of possible policy implications did not drive the end result, as Transco and Williams charge. That result—i.e., our finding that not every single one of the facilities presented was gathering—was reached following a straightforward, policy-implication-free consideration of the Farmland factors. Because the all-or-nothing gathering result the parties sought could only be reached by interpreting the Farmland factors in an unconventional manner, we reflected on the precedential complications such an aberrant application of our primary function test could beget in order to explain why we were unwilling to reformulate our routine method for assessing facilities' primary function.

We similarly reject the parties' contention that we allowed Transco' facilities' historic jurisdictional status to drive the

outcome of our primary function test. Additionally, we reject the parties' related claim that we refused abandonment as a means of "entrenching" the existing jurisdictional status of offshore facilities to further objectives set forth in our 1996 Policy Statement. While we presume facilities are properly classified (regardless of whether the Commission has recently, or ever, specifically evaluated the facilities' primary function), this presumption can be overturned by demonstrating that the facilities are being employed to render service inconsistent with their current classification. In this case, our consideration of the physical and geographic characteristics Transco's facilities led us to conclude that certain of those facilities were being used primarily to transport gas; a finding, as we noted, that was in accord with the facilities' prior and present classification and certification as transmission, thereby affirming that status.

The jurisdictional status of facilities is established principally by the facilities' physical characteristics. Nevertheless, we find it helps to also take into account the primary business purpose of the facilities' owner. In this case, that is Transco, an interstate gas transporter. Transco and Williams urge that instead of considering the facilities as they are currently used, i.e., to provide certificated transportation services, we look forward to the facilities' function under Williams' ownership, i.e., to provide NGA-exempt gathering services. This puts the cart before the horse. We first examine facilities as they are currently being used, and in that context the character of the facilities' current owner is relevant. If we determine that the facilities are being used primarily for nonjurisdictional service, we would authorize abandonment.

Williams' nonjurisdictional status had no bearing on our initial decision with respect to the primary function of Transco's facilities as operated by Transco. Transco and Williams note cases in which we took the nonjurisdictional status of a facility's prospective owner into account. Those

cases, like this one, involved an initial assessment to determine whether existing jurisdictional facilities merit abandonment as gathering, and if so, then whether the abandoned facilities would, under new ownership and management, continue to be used primarily for gathering. Only in this latter assessment is the character of the prospective owner an issue, an issue we did not reach in our September 1996 order, because we did not find the facilities merited abandonment by transfer to Williams.

The parties maintain that it is inconsistent for the Commission to mandate that pipelines unbundle gathering from transmission, and then deny a pipeline's request to abandon gathering facilities in an effort to ensure shippers retain NGA protection for NGA-exempt services. Such circumstances and motives are not present here. Here, we do not resist approving an abandonment of gathering facilities; rather, we find that Transco is requesting approval to abandon transmission facilities that are providing NGA-jurisdictional transportation services. We continue to endorse the principle of unbundling as set forth in Order No. 636, but we do so in a manner consistent with our statutory obligation to exercise our traditional regulatory jurisdiction over all facilities subject to the NGA.

The parties point to our discussion of adverse impacts that might arise were Transco to abandon facilities to its affiliate and suggest such impacts motivated our denial of Transco's request. We remain concerned that offshore, absent state control, upon acquisition of Transco's system, Williams may be in a position to engage in anticompetitive actions. However, issues of affiliate abuse, or the exercise of market power, or discrimination, or the denial of access, may be addressed, if need be, in another forum, apart from this or another abandonment proceeding. Our task in an abandonment proceeding is limited to answering the question of whether the primary function of the subject facilities is

gathering. In this case—where we have been presented with a large and complex collection of facilities and asked to reach an across- the-board finding applicable to all of those facilities—the answer is no, for the reasons discussed above and in our September 1996 decision.

Transco and Williams comment that were the Commission to disclaim regulatory jurisdiction under the NGA over all offshore facilities, the Commission's regulatory authority under the OCSLA would continue in effect; the parties speculate that regulation under the OCSLA alone would result in more rational oversight and expedite the exploitation of offshore resources. Merits aside, we do not view this as a viable proposal. The statutes provide similar, but not identical, protections, and subject regulated entities to comparable, but significantly different, requirements. Nevertheless, the NGA and OCSLA are neither optional nor alternative in nature. Where applicable, the provisions of each statute must be enforced—the Commission may not elect not to act. In addition, the NGA and OCSLA are to be applied simultaneously, to complement one another.[20]

For the reasons discussed above, we deny Transco's and Williams' request for rehearing.

The Commission orders:

> Transco's and Williams' joint request for rehearing is denied.

By the Commission.

/s/ Linwood A. Watson, Jr.,

Acting Secretary.

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[20] We treat the OCSLA and NGA as independent grants of statutory authority that "must be applied reciprocally in furtherance of their individual regulatory purposes." *Continental Oil Company v. FPC*, 370 F.2d 57, 66-67 (5th Cir. 1966).

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

Docket No. CP01-103-000
Docket No. CP01-104-000

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing-Gulf Coast Company, L.P.

ORDER AUTHORIZING ABANDONMENT AND DETERMINING JURISDICTIONAL STATUS OF FACILITIES
(Issued July 25, 2001)

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, Linda Breathitt, Pat Wood, III and Nora Mead Brownell.

On March 12, 2001, Transcontinental Gas Pipe Line Corporation (Transco) submitted an application in Docket No. CP01-103-000, pursuant to section 7(b) of the Natural Gas Act (NGA), seeking Commission approval to abandon facilities located largely offshore Texas and Louisiana, which are part of the North High Island/West Cameron Gathering System, by transfer to its gathering affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP). On the same date, WGP submitted a petition in Docket No. CP01-104-000 requesting that the Commission declare that the facilities it proposes to acquire from Transco will, upon abandonment by transfer to WGP, be gathering facilities and services, exempt from the Commission's jurisdiction under the Natural Gas Act (NGA).

For the reasons discussed below, we will approve Transco's requested abandonment and declare the facilities to be gathering.

I. Background and Proposal

The requested abandonment is part of an ongoing corporate-wide restructuring by The Williams Companies, Inc. (Williams), corporate parent of Transco and WGP, to abandon and transfer (spindown) gathering facilities from Transco and the other Williams-affiliated interstate pipelines into nonjurisdictional gathering companies. The facilities under consideration in these dockets were part of a more comprehensive gathering spindown request filed by Transco and WGP in Docket Nos. CP96-206-000 and CP96-207-000.[1] Those applications were dismissed without prejudice to the applicants' filing another proposal addressing discrete portions of the facilities. Transco states that it has reviewed its gathering facilities on a system- by-system basis under the Commission's primary function test in Sea Robin.[2] Transco states that this application is part of an effort to spindown gathering facilities under the principles of Sea Robin.

Transco states that most of the facilities comprising the North High Island/West Cameron system are the subject of various NGA Section 7(c) certificates issued by the Commission. Transco states that at the time they were acquired or constructed, these gathering facilities were used almost exclusively to deliver system supply gas to support bundled sales services. Transco states that under that historic

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[1] *Transcontinental Gas Pipe Line Corporation*, 76 FERC 61,317 (1996), *order denying reh'g*, 95 FERC ¶ 61,396 (2001).

[2] *Sea Robin Pipeline Company*, 71 FERC 61,351 (1995), *order on reh'g*, 75 FERC 61,332 (1996), *remanded Sea Robin v. FERC*, 127 F. 3d 365 (5th Cir. 1997), *reh'g denied* (February 2, 1998), *order on remand*, 87 FERC 61,384 (1999), *order denying reh'g*, 92 FERC 61,072 (2000), *order denying stay*, 92 FERC 61,217 (2000) (*Sea Robin*).

structure, Transco did not have a need to precisely distinguish between jurisdictional transmission and exempt gathering facilities. Accordingly, the fact that many of the subject facilities were constructed pursuant to NGA certificates is not an indication of whether the facilities actually qualify for exempt gathering status under Section 1(b) of the Natural Gas Act (NGA). Transco states that under the Commission's current reformulated primary function test, the North High Island/West Cameron facilities perform primarily a gathering function.[3]

Transco also requests authorization to abandon its Rate Schedules X- 143 (service with ANR Pipeline Company) and X-249 (service with Columbia Gulf Transmission Company). Transco states that no gas has flowed under either of the X-rate schedule service agreements since 1991. Transco also seeks authority to partially abandon its Part 284 service provided to Motiva Enterprises, LLC, insofar as it pertains to specific receipt points on the North High Island facilities. Transco states that upon abandonment and transfer of the requested facilities to WGP, the referenced receipt points will no longer be available to be used by shippers under the affected blanket services or as a balancing point under a Pipeline Interconnect Balancing Agreement. Transco states that upon approval of this application, Transco will amend affected service agreements and file the necessary conforming changes to its FERC Gas Tariff, such as the termination of tariff sheets and removal of references to the abandoned points/facilities.

Transco proposes to transfer the subject facilities to WGP pursuant to the Transfer and Assignment Agreement dated February 19, 1996, as amended on December 29, 1997, at net book value at the time of closing, resulting in no gain or loss to Transco. Following a Commission order approving aban-

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[3] *See* WGP's Petition at Sections VII and VIII.

donment acceptable to Transco and WGP, Transco proposes to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of such order, or at a mutually agreeable date thereafter. Transco will notify the Commission within ten (10) business days of the transfer of the facilities. Transco states that if this abandonment is approved prior to Transco's next general Section 4 rate case filing, then in accordance with Transco's rate settlement in Docket Nos. RP97-71-000, et al., Transco will make a rate filing as necessary to reflect the spindown after Commission approval. Transco states that the depreciated net book value of these facilities is approximately $21,180,514 as of December 31, 2000.

Transco states that the application to abandon and transfer the North High Island/West Cameron gathering systems is consistent with Williams' ongoing corporate restructuring, whereby the gathering facilities of Williams' interstate pipelines have been unbundled and spundown to companies focused on providing gathering services. Transco states that the spindown of gathering facilities by Williams' interstate pipelines, other than Transco, is largely complete. The Commission has approved those prior spindowns, finding that they will serve the public interest and are consistent with the Commission's industry restructuring and pro-competitive policies. Transco states that for the same reasons, the Commission should likewise approve the instant application.

Transco states that WGP is currently operating the subject facilities as Transco's agent and WGP plans to negotiate post-spindown service agreements with all shippers. Transco states that WGP will continue to operate the facilities in an open and nondiscriminatory manner. In that regard, while the spundown facilities will not be subject to the Commission's NGA jurisdiction, the facilities are subject to the Outer

Continental Shelf Lands Act (OCSLA),[4] which mandates that all Outer Continental Shelf (OCS) pipelines provide "open and nondiscriminatory access" to their OCS facilities.[5]

In prior spindown cases, the Commission has required the pipeline to adopt tariff provisions ensuring that it will not provide any undue preference to affiliates. Transco states that Section 36 of the General Terms and Conditions of Transco's tariff already includes such provisions.

II. Description of facilities

Transco states that the North High Island/West Cameron facilities which are the subject of this application are located primarily offshore Texas and offshore and onshore Louisiana. Transco states that the offshore facilities are located in the Galveston area, the High Island area, and the West Cameron area; the onshore facilities are located in Cameron and Vermillion Parishes, Louisiana. Transco states that this gathering system consists of two subsystems that are operated for the most part independently, i.e., the North High Island subsystem collecting gas from the west, and the West Cameron subsystem collecting gas from the east. Transco states that the two subsystems converge onshore in Cameron Parish, Louisiana, where the gas is ultimately delivered into the Southwest Louisiana transmission lateral, jointly owned by Transco, Tennessee Gas Pipeline Company, and Florida Gas Transmission Company. Transco states that gas from the North High Island subsystem is separated and dehydrated at Transco's Compressor Station 44 in Cameron Parish; and gas from the West Cameron subsystem is separated and dehydrated at the Cameron Meadow Processing Plant, owned by Williams Field Services Group, Inc. Transco states that

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[4] 43 U.S.C. § 1331, *et seq.*

[5] 43 U.S.C. § 1334 (f)(1)(A).

gas from both subsystems is processed at the Cameron Meadows Plant when economics warrant.

The North High Island/West Cameron facilities which are the subject of this application are:

1. Pipeline—approximately 217.128 miles of 4-inch to 30-inch pipeline, consisting of:

0.57 miles of 3.5-inch pipeline

1.51 miles of 4-inch pipeline

1.15 miles of 4.5-inch pipeline

3.89 miles of 6-inch pipeline

8.02 miles of 8-inch pipeline

17.092 miles of 10-inch pipeline

45.227 miles of 12-inch pipeline

53.054 miles of 16-inch pipeline

86.355 miles of 24-inch pipeline

00.26 miles of 30-inch pipeline

2. Station 44 Separation and Dehydration (Johnson Bayou Plant), located in Cameron Parish, Louisiana, consisting of: two 100-HP Waukesha and one 1,000 HP Waukesha Flash Gas Compressors, with a total sea level horsepower of 1,200, and separation and dehydration facilities.

3. Station No. 44 Compression, located in Cameron Parish, Louisiana, consisting of: three 3,830-HP Solar Centaur Engines driving three compressors with a total sea level horsepower of 11,490. One of the three Solar Centaur compressors is jointly owned with Gulf South Pipeline Company, LP.

4. Minor compression owned by Transco on Shell High Island Block 179-L, offshore Texas.

Certain segments of the North High Island pipelines are owned by Transco and other third parties.[6] The North High Island/West Cameron facilities proposed to be abandoned include a number of valves, meters and related appurtenant pipeline facilities located throughout the systems. These related facilities constitute an integral part of the nonjurisdictional gathering function of the facilities sought to be abandoned and are also proposed to be abandoned and declared nonjurisdictional.

III. WGP's Petition for Declaratory Order

WGP states that the North High Island/West Cameron facilities should be declared nonjurisdictional gathering facilities because: (1) the length and diameter of the pipelines are relatively small; (2) numerous wells are located throughout the system; (3) the operating pressures are consistent with offshore gathering; (4) the compression at Station 44 is for increasing the volume of gas gathered into the system as the final stage of gathering, not for downstream transportation; (5) all the facilities are upstream of the Cameron Meadows Processing Plant; (6) the system configuration resembles an inverted "U," or in a manner analogous to the upstream legs of the "Y" shaped Sea Robin system; and (6) the facilities, except for a quarter mile piece of pipe, do not extend beyond the system's central aggregation point.

WGP states that the North High Island/West Cameron facilities also qualify as gathering under the central aggregation point test relied on in Sea Robin. WGP states that the North High Island facilities and the West Cameron facilities converge at the Station 44 complex in Cameron Parish, Louisiana, which constitutes the system's central aggregation point. All of the facilities to be spundown are

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[6] Transco states that Gulf South Pipeline Company, LP, Shell Offshore, Inc. and Exxon Company, U.S.A. Inc. also have ownership interests.

upstream of, and feed into, that central aggregation point, with the exception of a 0.26 mile, 30-inch plant related pipe directly downstream of the Cameron Meadows Processing Plant that is needed to deliver gas into the Southwest Lateral.

Interventions and Protests

Transco's application for abandonment authorization in Docket No. CP01- 103-000 was published in the Federal Register on March 23, 2001.[7] Timely, unopposed motions to intervene were filed by companies as listed in the Appendix.[8] Washington Gas Light Company, Superior Natural Gas Corporation and Walter Oil & Gas Corporation, and the Producer Coalition filed untimely motions to intervene. We find that granting the motions to intervene out-of- time will not delay the proceeding, prejudice the rights of any party, or place an additional burden on existing parties. Accordingly, for good cause shown, we will grant the late-filed motions to intervene.[9] Consolidated Edison Company of New York, Dynegy Energy Marketing and Trade, Indicated Shippers, KeySpan Delivery Companies, Producer Coalition, Superior Natural Gas Corporation and Walter Oil & Gas Corporation, and Sunoco Inc. filed protests. The Transco Municipal Group and the Municipal Gas Authority of Georgia filed comments.

WGP's petition for a declaratory order in CP01-104-000 was published in the Federal Register on March 23, 2001.[10] Timely, unopposed motions to intervene were filed by

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[7] 66 FR 16218.

[8] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2000).

[9] 18 CFR § 385.214(d) (2000).

[10] 66 FR 16219.

companies as listed in the Appendix.[11] Consolidated Edison Company of New York, Indicated Shippers, KeySpan Delivery Companies, Superior Natural Gas Corporation and Walter Oil & Gas Corporation, and Sunoco Inc. filed protests.

On May 9, 2001, Transco and WGP filed an answer to the protests that had been filed up to that time. On July 19, 2001, Transco and WGP filed answers to the protests filed June 11 and June 20, 2001. Although our procedural rules do not permit answers to protests, or answers to answers, we may, for good cause, waive this provision.[12] We find good cause to do so in this instance in order to insure a complete and accurate record in this proceeding.

We address the substance of the protests and responsive pleadings below.

IV. DISCUSSION

A. Abandonment

Since the facilities proposed to be abandoned were certificated to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the abandonment of Transco's certificated interests in the OCS facilities requires Commission authorization under NGA section 7(b).

Transco historically designed, constructed and operated its systems in order to perform a bundled service—purchasing and aggregating gas supplies and transporting those supplies for sale to local distribution companies at the city gate. However, since the restructuring of the natural gas industry, Transco provides an array of unbundled services, such as

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[11] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2000).

[12] 18 CFR § 385.213(a)(2) (2000).

transportation, storage, and fully unbundled sales services, to a wide variety of customers. In its principal role as a transporter, Transco no longer requires its extensive gathering facilities to provide gas sales. Moreover, most of Transco's sales are made at its pooling points, not at the wellhead. We expect abandonment will permit Transco to eliminate unnecessary expenses associated with these facilities and we expect WGP will make efficient use of the acquired facilities. Accordingly, for the reasons discussed below, we find that the public convenience and necessity permit Transco to abandon by transfer to WGP the portion of the offshore North High Island/West Cameron Systems found to be gathering herein.

B. Opposition to the Abandonment

Various parties oppose the abandonment arguing that the facilities have and continue to perform a transmission function, and that any transfer of facilities to WGP will result in a lack of competitive alternatives and allow WGP to wield substantial market power over shippers.

1. Impact on Existing Shippers

Indicated Shippers, an ad hoc group of companies interested in gas transported on Transco's system,[13] object that the proposal would undo decades of Commission jurisdiction over the entirety of Transco's system and may permit the Transco corporate family to impose rates in excess of those previously deemed just and reasonable. Sunoco, Inc. (R&M) (Sunoco) agrees. Indicated Shippers object to Transco transferring a portion of its integrated system, including

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[13] The members of the Indicated Shippers include: Amerada Hess Corporation, Amoco Production Company and BP Energy Company, Anadarko Petroleum Corporation, Burlington Resources Oil & Gas Company, Chevron U.S.A. Inc., Conoco Inc., Exxon Mobil Corporation, OXY USA Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc. Each of the members has also intervened separately.

facilities currently functionalized as transmission, to an unregulated affiliate. Indicated Shippers also dispute the contention that maintaining these facilities as transmission hinders Transco's ability to compete with exempt gatherers, pointing out that Transco may discount its rates to compete and that Transco has failed to identify any gatherer against which it cannot effectively compete. Indicated Shippers contends that if the systems remain regulated, Transco will not be able to collect rates in excess of its maximum tariff rates. Indicated Shippers further states that in the absence of competitive alternatives, the abandonment of the North High Island/West Cameron systems will allow WGP to wield substantial market power permitting them to exact monopoly rents from shippers.

Dynegy Marketing and Trade (Dynegy) believes similarly that the spindown will stifle competition. Dynegy argues that since Williams Field Services (WFS), another Transco affiliate, operates Transco's jurisdictional facilities immediately downstream from the High Island/West Cameron system, WGP will hold a competitive advantage over all non-affiliated third parties who can only provide access to their own gathering systems. It argues that any advantage of Commission imposed unbundling is lost here because of the control that Transco has given WFS over the mainline facilities.

Sunoco states that WGP appears on planning to disavow Transco's existing contractual obligations and to force shippers to renegotiate long-term agreements that had been entered into at arm's length. Sunoco states that according to Transco, after the transfer of the subject facilities to its non-jurisdictional affiliate, "WGP plans to negotiate post-spindown service agreements with all shippers." Sunoco submits that such renegotiation is totally inappropriate where shippers have existing long-term contracts. However, if the spindown is approved, Sunoco requests that the Commission

require Transco to file revised tariff sheets in its pending section 4 rate case in Docket No. RP01-245-000 to reflect removal of the facilities from rate base and the elimination of the operation and maintenance cost from its cost of service.

In a related vein, Con Edison requests that the Commission require that Transco present evidence as to the market value of the subject facilities and, if that value exceeds the net book value, require Transco to offset the excess against extraordinary costs underlying its proposed general rate increase in Docket No. RP01-245-000.

The KeySpan Delivery Companies request that the Commission not only approve the spindown of the North High Island/West Cameron facilities, but all of the remaining production area facilities and require under section 5 of the NGA that Transco's rates be adjusted to reflect the removal of the related costs from Transco's jurisdictional rates. The Transco Municipal Group and the Municipal Gas Authority of Georgia (collectively Municipal Group) likewise request that Transco's rates be modified under Transco's pending section 4 proceeding in Docket No. RP01-245-000. If the spindown is approved after September 1, 2001, the effective date of the pending section 4 proceeding, Municipal Group requests that Transco be required to file a limited section 4 rate case to reflect fully the rate effects of the spindown. Dynegy agrees, stating that the Commission should take action under section 5 of the NGA to reduce Transco's rates if the proposed transfer of facilities occurs after the conclusion of the test period in Transco's pending section 4 proceeding. Alternatively, Dynegy requests that the Commission set this issue for hearing in the Docket No. RP01- 245-000 proceeding.

Producer Coalition, another ad hoc group of natural gas producers, who market gas on Transco's system,[14] suggests that the Commission require Transco/WGP to disclose the proposed rates and conditions of future service on the North High Island/West Cameron facilities, prior to the issuance of a Commission order on the spindown. Producer Coalition disputes Transco/WGP's contention that WGP is negotiating with its customers and offering a package of services. It contends that WGP has failed to make any disclosure of the rates and terms and conditions it intends to offer. Without this advance information, Producer Coalition states that the shippers are left to assume the worst—that WGP in fact intends to exploit its market power.

Indicated Shippers also question the appropriateness of Transco abandoning 40 receipt points from the FT agreements. It states that the abandonment would also delete these receipt points from those available to IT- feeder shippers that ship gas under Transco's tariff to FT shippers. Indicated Shippers states that, contrary to Transco's assertion, the public interest is not served by the unilateral termination or degradation of existing firm services or by the abandonment of IT-feeder facilities to a non-jurisdictional affiliate.

Superior Natural Gas Corporation and Walter Oil & Gas Corporation offer similar arguments opposing the spindown. They allege that the proposal is nothing more than a vehicle to significantly increase the production area rates that marketers and producers must pay over the regulated IT-feeder rates currently being charged. They also believe that the primary function of the facilities at issue remains transmission.

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[14] This group consists of Dominion Exploration & Production, Inc., Devon Energy Corporation, Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, Ocean Energy, Inc., and TotalFinaElf E&P U.S.A., Inc. Ocean Energy, Inc. has already intervened in this case.

a. Transco and WGP Response

Transco/WGP believe that the Indicated Shippers' protest should be denied, because it is largely a collateral attack on the Commission's court-approved policy [15] favoring the spin-down of gathering facilities, which Transco/WGP contend is consistent with the Commission's unbundling policies and other pro- competitive objectives. They also contend that the Indicated Shippers' functional analysis of the facilities unduly relies on non-physical factors, such as prior certificate and rate classification, system integration, and effects on competition, ownership and business purpose, which the courts have repeatedly held are of little or no relevance to the jurisdictional status of facilities under section 1(b) of the NGA. As to the issues of competitive factors and market power, Transco/WGP state that the Commission has found them irrelevant in determining the function of OCS facilities.[16] Transco/WGP find it disingenuous that some of the protestors consistently oppose spindowns by interstate pipelines, while at the same time some of them enjoy non-NGA regulated status for their own OCS gathering pipelines. Transco/WGP also point out that, even in the absence of continued NGA regulation of these facilities, Indicated Shippers still will be protected by the open access and nondiscrimination provisions of the OCSLA.

Transco/WGP agree with KeySpan's request to expand the scope of the spindown proposal, and indicate that the Commission could meet that concern simply by granting rehearing of Transco/WGP's comprehensive spindown proposal requested in Docket No. CP96-206-000 and CP96-

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[15] Citing *Conoco Inc. v. FERC*, 90 F.3rd 536 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1142 (1997) (Conoco); *Pacific Gas and Electric Company v. FERC*, 106 F.3rd 1190 (5th Cir. 1997).

[16] Citing *Mid Louisiana Gas Company*, 67 FERC 61,255 at 61,851 (1994).

207-000. As to the requests that the Commission require Transco to remove from its rates the cost of the facilities to be transferred, Transco states that if the Commission approves the spindown prior to the effective date of its next effective rate case, it will make a rate filing to reflect the spindown as approved.

Finally, Transco/WGP state that Con Ed's request (to offset the difference between the net book value and the market value of the subject facilities) should be denied as the Commission allows the transfer of facilities at net book value.

b. Commission Response

Transco, like many interstate pipelines, found after restructuring its system consistent with Order No. 636, and moving from a bundled, merchant function to an unbundled, transportation function, that it no longer needed all of its existing system facilities. The Commission routinely grants requests to abandon facilities that we determine were used to gather gas supplies in support of the merchant gas sales function a pipeline no longer offers.[17] The fact that these facilities were previously certificated is not determinative of whether the present or future public convenience and necessity allow their abandonment. Further, the fact that a certificate exists for a given facility may not be determinative of its true jurisdictional status. As we stated in CNG Transmission Corporation, "until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined." [18] Here, we find it reasonable for Transco to seek to abandon the proposed facilities via spindown to its gathering affiliate because this is the proper

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[17] *See Trunkline Gas Company*, 95 FERC 61,337 (2001); *Natural Gas Pipeline Company of America*, 94 FERC 61,186 (2001); and *Northern Natural Gas Company*, 93 FERC 61,101 (2000).

[18] 67 FERC 61,330 at 62,177 (1994).

forum to apply the primary function test to these facilities. We also find that the record in this proceeding is adequate for us to determine the proper function of the facilities.

The protestors argue that existing shippers will be adversely affected by the spindown because there will be no competition and they will have to deal with an unregulated entity for the same service that they currently receive from Transco. The transfer of gathering facilities and services by interstate pipelines to nonjurisdictional entities is consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry.[19] As we have noted, section 1(b) of the NGA exempts gathering from the jurisdiction of this Commission. Thus, if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion to withhold such authorization. Here, consistent with the discussion below, we are finding that a portion of High Island/West Cameron facilities perform a gathering function. The remainder of the facilities perform a transmission function.

Nor is the issue of competition relevant to whether or not the Commission will regulate an affiliated gatherer's rates or terms and conditions of service after it acquires abandoned facilities. The Commission has no authority under the NGA to regulate a gatherer's rates or its terms and conditions of service.[20] We find that the separate rate structure shippers will encounter after the spindown is consistent with the unbundling principles expressed in Order No. 636, where the Commission noted that shippers are expected to pay a separate rate for each separate service they receive. The shippers, in effect, have been on notice since February 21,

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[19] *See Northern Natural Gas Company*, 93 FERC 61,101 at 61,273 (2000).

[20] *Conoco.*

1996, when Transco filed its initial application in Docket No. CP96-206-000, that it proposed to abandon, among others, the facilities at issue here. This interval of over five years has provided an extended transition period for these shippers to contemplate their service options in the event the abandonment of these facilities was approved.[21]

In addition, the facilities at issue here are located on the OCS and will become subject to the OCSLA upon approval of the spindown. Under the OCSLA, WGP is prevented from discriminating against any shipper that seeks access to the facilities it will acquire in this proceeding from Transco. Assuming all existing shippers using the North High Island/West Cameron System want to continue moving their gas via the same path, both they and WGP will have a vested interest in reaching mutually agreed upon terms and conditions for continuation of the existing service. Since the OCSLA guarantees shippers open and nondiscriminatory access to offshore facilities, WGP cannot discriminate between shippers and has incentive (fully utilized facilities) to negotiate fairly with Transco's existing shippers. In Transco/WGP's answer, WGP states that it intends to negotiate post-spindown agreements with all shippers that should not result in degraded service. Since we will continue to employ our NGA authority to ensure that Transco's jurisdictional rates remain just and reasonable, WGP's commitment, along with the protections provided by the OCSLA, will act to ensure adequate access and service to

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[21] *See NorAm Gas Transmission Co.*, 78 FERC 61,265, at 62,128 (1997). We previously conditioned the spindown or spinoff of gathering facilities on the acquiring entity's continuing to provide comparable service to existing shippers for a two-year term. This two-year time was intended to serve as a transitional period, during which shippers subject to NGA-regulated transportation service agreements could consider their options as NGA-exempt gathering customers. In *Conoco*, however, the court ruled that the Commission lacked jurisdiction to impose this particular condition on abandonments.

existing customers. We note that section 330.2 of our OCSLA regulations requires that WGP report the terms under which it provides service to its shippers.[22] In the event that any shipper believes that either Transco or WGP have violated its statutory requirements under the OCSLA, or that the terms of service WGP offers any existing shipper prove inconsistent with the OCSLA's requirements, the shipper can file a complaint and the Commission will investigate any such complaint in a timely manner.[23] Further, Transco already has in its tariff standards of conduct for gathering affiliates that prevent it from acting in a discriminatory manner by guarding against the risk of affiliate abuse and ensuring an arms length relationship between it and WGP.[24]

Dynegy, however, doubts the level of protection afforded by Transco's standards of conduct provisions, because WFS administers the immediate downstream mainline transportation rights on behalf of Transco. However, Transco must adhere to the affiliate provisions, regardless of whether it or WFS operates the mainline facilities. Transco is bound by its tariff and cannot seek to avoid its responsibilities regarding its jurisdictional mainline facilities simply by contracting operational control to its affiliate, WFS. In operating such facilities, WFS is stepping into Transco's jurisdictional shoes, and Transco cannot allow WFS to provide service in a manner contrary to Transco's tariff.

As to the requests that Transco adjust its rates, we will require Transco, consistent with Section 154.303(c)(2) of our regulations, to remove the cost of the facilities abandoned and transferred here from the rates it proposes to charge in its

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[22] 18 CFR § 332.2 (2000).

[23] 18 CFR § 385.206 (2000).

[24] *See* Third Revised Sheet No. 350, Third Revised Volume No. 1 to Transco's FERC Gas Tariff.

current rate proceeding in Docket No. RP01-245-000. Thus, we will deny Dynegy's request for a hearing.

Finally, we disagree with Con Ed's objection to Transco's proposed transfer of facilities to WGP at net book value. Transco will not realize any gain from the transfer of its facilities which it could share with its ratepayers. Therefore, Transco's ratepayers will be in the same position after transfer of the facilities as before the transfer. We find that ratepayers will not be harmed, and that the transfer of the facilities at net book value is appropriate.

2. Changed Position on Facilities

Indicated Shippers argue that Transco has previously argued that its offshore and onshore facilities were transmission facilities because they constitute a unitary, interdependent and integrated pipeline system that have always been regulated. They contend that Transco has not justified its change in functionalization of the facilities from transmission to gathering. The Producer Coalition and Superior/Walter argue similarly.

a. Transco/WGP Response

Transco/WGP contend that the factors these protestors rely on (i.e., prior certificate and rate status, integrated nature of facilities, ownership by an interstate pipeline, reliance on past regulation, and the presence or absence of competition) are of little or no relevance to the jurisdictional status of the facilities.

b. Commission Response

We find no cause to disallow Transco the right to claim its facilities perform a gathering function, when in the past it may have advocated the facilities function as transmission. As noted above, the Commission has consistently found that a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the

facilities for purposes of jurisdiction under section 1(b) of the NGA. How pipelines historically functionalized their facilities for rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities.[25] Here, we are finding that portions of the High Island/West Cameron System do, in fact, perform a gathering function and are therefore exempt from our jurisdiction under section 1(b) of the NGA. However, as we stated above, those facilities will remain subject to the OCSLA's requirements for open and nondiscriminatory access for all shippers.

C. Jurisdictional Status of Facilities

WGP asks us to declare that the North High Island/West Cameron System would be non-jurisdictional gathering facilities if operated as described in its petition.[26]

Under NGA section 1(b), the Commission has jurisdiction to regulate the transportation and sale for resale of natural gas in interstate commerce and any natural gas company engaged in that transportation or sale. Section 1(b) states, however, that the Commission's jurisdiction does not extend to facilities used for the production or gathering of natural gas. To determine whether particular facilities perform primarily a gathering or transmission function, the Commission considers the criteria articulated in Farmland

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[25] *See Southern Natural Gas Company, et al.*, 79 FERC 61,076 at 61,379 (1997).

[26] Transco's proposed spindown is being undertaken at the same time as Transco seeks in Docket No. RP92-137-050 to implement a two-part, production area, straight fixed variable rate proposal, and firm-to-gathering rate design. The Commission addressed these issues in its May 31, 2001 order in that proceeding, 95 FERC 61,322 (2001).

Industries, Inc., (Farmland) [27] as modified by Amerada Hess Corporation (Amerada Hess) [28] and Sea Robin.

In Farmland, the Commission enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the location of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures of the facility.[29] The Commission does not consider any single factor to be determinative and recognizes that all factors do not necessarily apply in all situations.

Over the past decade, the Commission found it necessary to modify the primary function test to recognize the unique physical characteristics of offshore pipeline facilities built on the OCS. In Amerada Hess, the Commission acknowledged that technological advances make it possible to drill for gas at increasing offshore depths. Thus, following Amerada Hess, the Commission has applied a "sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area." [30] This "modified primary function" test recognizes that a relatively long pipeline on the OCS may be consistent with a primary function of gathering or production where onshore it would not.

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[27] 23 FERC 61,063 (1983).

[28] 52 FERC 61,268 (1990).

[29] In addition to the Farmland factors, the Commission considers these non-physical criteria in its jurisdictional analysis: (1) the purpose, location, and operation of the facility, (2) the general business activity of the owner of the facility, and (3) whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act.

[30] *Id.* at 61,988.

In order to further clarify the jurisdictional status of offshore facilities, the Commission issued an OCS Policy Statement [31] which added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more. The Policy Statement creates a presumption that these deep water facilities are gathering facilities up to the point or points of interconnection with the interstate pipeline grid. Aside from this presumption concerning deep water facilities, the Policy Statement left the application of the primary function test unchanged.

More recently, as a result of the court's opinion in Sea Robin, the Commission has reconsidered the primary function test in view of the unique challenges presented in the attempt to apply Farmland factors to offshore facilities. Sea Robin vacated and remanded Commission orders that found under the primary function test, that Sea Robin's OCS pipeline facilities were jurisdictional transmission facilities. In its primary function analysis, the Commission excluded most of the Farmland factors because they were difficult or impossible to apply to the distinct activity of retrieving gas from the OCS. Thus, the only physical factor considered by the Commission was the size and length of Sea Robin's pipeline. The Commission also gave weight to non-physical criteria such as business purpose, ownership and prior certification of the facilities.

The *Sea Robin* court found, among other things, that the Commission's focus primarily on the length and diameter of the overall system was not reasoned consideration. Further, the court acknowledged that non-physical considerations are

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[31] Gas Pipeline Facilities and Services on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC 61,222 (1996), *order dismissing reh'g*, 75 FERC 61,291 (1996).

relevant in the analysis but that they are secondary to physical considerations which must be used in determining where gathering ends and transportation begins.

On remand, the court allowed the Commission to reformulate its primary function test—to replace those physical and operational criteria that are not relevant to the characteristics of OCS pipelines with other criteria that are. The court also allowed that the Commission could consider suggestions made by Sea Robin that portions of its system were predominantly involved in gathering while other portions were transmission.

In the order on remand in Sea Robin, the Commission took the court's suggested approach and reconsidered the application of the primary function test to the OCS facilities and concluded that the "behind-the-plant" factor was not necessarily determinative when the primary function test is applied to offshore facilities. Rather, the Commission decided to assess the physical configuration of a pipeline system to determine if there is a central location where gas is aggregated for further transportation to shore. The Commission concluded that it would view such a location as being the offshore equivalent of the onshore "central-point-in-the-field" factor of the primary function test.

In sum, the reformulated primary function test (1) adopts an additional analytical element applicable to systems that contain a centralized aggregation point, (2) adjusts the weight afforded to the "behind-the-plant" criterion so that the location of the processing plants is not necessarily determinative and can be outweighed by other factors, and (3) focuses primarily on physical factors. After applying the reformulated primary function test to Sea Robin's system, the Commission determined that gathering on Sea Robin ends at an internal point on the pipeline's certificated system—that point being Sea Robin's Vermillion Block 149 Compression Station where gas from numerous production platforms is

aggregated—and that transportation occurs over the remaining and longest part of its system which consists of a straight, large diameter trunkline that delivers gas to onshore processing plants.

1. Protests

Indicated Shippers protests WGP's request for a declaratory order stating that in the OCS Policy Statement, the Commission rejected calls by Transco and other companies that all OCS facilities be found to be gathering. Indicated Shippers argues that the Policy Statement provides that new facilities located in water depths of 200 meters or more will be presumed to be gathering, but that the Commission would not withdraw its jurisdiction, absent changed circumstances, for existing facilities in shallower waters. Indicated Shippers submits that the facilities at issue are located in waters shallower than 200 meters and that Transco has not demonstrated that the primary function of the facilities has changed. Sunoco contends similarly and states that the overwhelming majority of the facilities subject to the spindown are not characteristic of gathering facilities. Likewise, Superior/Walter argue that Transco has not shown that the facilities are, in fact, gathering rather than transmission.

Indicated Shippers and the Producer Coalition also dispute Transco's reliance on Sea Robin as the primary support for their request to refunctionalize the North High Island/West Cameron facilities. In particular, Indicated Shippers object to the new "central aggregation point" test added to the OCS criteria and point out that certain parties have sought court review of the Sea Robin orders setting forth the new test. Indicated Shippers also note that numerous wells to be attached to the two systems are located some distance from any of the Transco facilities. They submit that the gathering function is applicable to these facilities, not the Transco facilities at issue. Indicated Shippers also note that a number

of the facilities at issue are jointly owned with other pipelines, and request that the Commission investigate whether, from the perspective of the operations and activities of the other owners, the facilities should remain transmission.

Indicated Shippers also submit that a central factor in determining the primary function of the facilities at issue is the overall business purpose of the system. They submit that the OCS transmission facilities are part of Transco's integrated pipeline system.

Producer Coalition primarily objects to the services using the facilities no longer being subject to rate caps if the Commission determines the facilities to be gathering. Producer Coalition suggests that the Commission take no action on the spindown until after the United States Court of Appeals for the D.C. Circuit decides the Sea Robin case. Like Indicated Shippers, Producer Coalition submits that, rather than the reformulated modified primary function test announced in Sea Robin, the Commission should adopt the "feeder line test" described in the legislative history to Section 5(f)(2) of the Outer Continental Shelf Lands Act (OCSLA). Under the feeder line test, gathering extends from the wellhead to the point where the gas is first collected and treated to remove free water in preparation for injection into a pipeline for transportation to shore. Producer Coalition believes that since the facilities listed in the application and petition appear to be downstream of the platform separators and treating facilities, they are not gathering facilities.

Producer Coalition also believes that, even if the Commission's Sea Robin order is sustained, the Transco facilities are not used for a gathering function. It notes that Transco and WGP rely on the Commission's central point of aggregation test. However, it states that the Commission determined in later orders that the primary function of offshore facilities was not reduced to simply identifying the

first fork or interconnection in a line leading from shore.[32] It stresses the integrated nature of Transco's system and indicates that the Commission takes the aggregation point on a system into account along with other factors of the primary function test.

Indicated Shippers, the Producer Coalition and Sunoco all argue that the size and scope of the North High Island/West Cameron facilities are highly indicative of a transmission function. They further argue that WGP's reliance on the "Y" analysis defeats the purpose, since the point of aggregation occurs onshore, rather than offshore like Sea Robin. Indicated Shippers and the Producer Coalition contend that Transco's proposal is flawed, because it contains more than 208 miles of pipeline, including more than 86 miles of 24- inch pipeline, that perform strictly a transmission, not gathering function.

KeySpan states that if the Commission finds that the North High Island/West Cameron facilities perform a gathering function, then the offshore portion of Transco's Mobile Bay expansion facilities, which were certificated in Docket No. CP97- 92-000,[33] should be considered non-jurisdictional as well because the facilities exhibit similar characteristics.

a. Transco/WGP Response

Transco/WGP contend that the Indicated Shippers' functional analysis of the facilities unduly relies on non-physical factors, such as prior certificate and rate classification, system integration, and effects on competition, ownership and business purpose, which the courts have repeatedly held are of little or no relevance to the jurisdictional status of facilities under section 1(b) of the NGA. Transco/WGP also point out that, even if the absence

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[32] *See Dauphin Island Gathering System*, 93 FERC 61,198 at 61,654 (2000).

[33] 76 FERC 61,317 (1996).

of continued NGA regulation of these facilities, Indicated Shippers still will be protected by the open access and nondiscrimination provisions of the OCSLA.

Contrary to Indicated Shippers' contention that the Sea Robin decision is too broad an interpretation of the NGA section 1(b) exemption, WGP states that it showed in that case that the Commission's reformulated primary function test results in too limited a view of the exemption. Nevertheless, Transco/WGP state that they relied on Sea Robin to guide the scope of the instant spindown, while reserving their right to challenge any findings in appropriate proceedings. Transco/WGP submit that Sea Robin provides compelling support for non-jurisdictional status for the subject spindown, in that the legs of the North High Island/West Cameron system are comparable to the upstream legs of the Sea Robin system which were ruled nonjurisdictional.

b. Commission Response

We conclude, for the reasons discussed below, that an assessment of the primary function factors, as modified with respect to offshore facilities, demonstrates that only a portion of the North High Island/West Cameron facilities at issue here are performing primarily a gathering function and will continue to be used in this capacity following their abandonment by sale to WGP. The remainder of the facilities perform a transmission function.

The facilities consist of two subsystems, the North High Island and West Cameron, that generally operate independently, with the North High Island facilities collecting gas from the west in Offshore Texas and the West Cameron facilities collecting gas from the east in Offshore Louisiana. The two systems converge onshore at a complex in Cameron Parish, Louisiana, consisting of Transco's Compressor Station 44 (Johnson Bayou Plant) and Williams Field

Services' Cameron Meadows Processing Plant, before ultimate delivery into the Southwest transmission lateral jointly owned by Transco, Tennessee Gas Pipeline Company, and Florida Gas Transmission Company. The Commission finds it appropriate to separate the North High Island and West Cameron subsystems and consider them independently for purposes of applying the primary function test.

The North High Island subsystem consists of approximately 174 miles of 4 to 30- inch pipeline. The majority of the facilities are relatively small, with the lines ranging from 4 to 24-inches in diameter. The longest segment is a 63 mile, 24-inch Line C that connects all the upstream facilities with the plant complex onshore. We find that it is along this line that the primary function of the facilities changes from gathering to transmission. The 24-inch Line C interconnects in High Island Block 10 with a 12 mile 16-inch line and with three short four- inch lines. While Line C retains its 24-inch diameter downstream of this point, it nevertheless serves as the central point of aggregation for the subsystem, where all the gas gathered upstream is delivered to a single point for transportation onshore. Although the North High Island Block 10 point does not exhibit as strong an indication of a marked physical change in facilities as was the case in Sea Robin, we nevertheless find it functions as an aggregation point that may be interpreted as indicating a demarcation of gathering and transmission functions.

Upstream from the Block 10 point, the length and diameter of the numerous pipelines are short and small compared to the facilities found to be gathering in Sea Robin. These line sizes are common for offshore gathering facilities, and even the 24-inch line upstream of the central aggregation point does not necessarily denote a transmission function. These lines are sized appropriately to gather the large volume of gas that is collected from the various wells located throughout the production area in which the facilities are located. In fact,

wells are located all along the length of the lines, up to the High Island Block 10 juncture. While not all of the wells may be directly connected to these lines, that does not disqualify the lines from a finding of gathering. It merely reflects the nature of offshore production, where gas from numerous wells is aggregated at production platforms for movement onshore.

The North High Island subsystem is configured in the shape similar to an inverted "Y" or "U" with the 4-inch, 12-inch, and 24-inch lines branching out from a central point at High Island Block 10. Consistent with Sea Robin, the legs upstream from the central point intersect with supply laterals throughout their length. This configuration is consistent with a gathering function. However, from the Block 10 junction downstream, we find that the 24-inch line performs a transmission function. From that point, the 24-inch line no longer collects gas from the surrounding area, instead, it transports gas already gathered onshore for treatment.

There is no compression located along the North High Island facilities upstream of the Block 10 juncture,[34] which means that the system operating pressures of between 800 and 1,300 psig are a function of the wellhead pressures. The wellhead pressures act to push the gas through the facilities, which is typical of a gathering function.[35] These operating pressures are consistent with those of other offshore facilities found to be gathering.[36]

In addition, there are no processing plants located on or connected to the North High Island facilities found to be gathering here. The processing facilities are located on the

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[34] WGP states that there is one minor compression facility on a production platform connected to one of the upstream legs.

[35] *See Tarpon Transmission Company*, 78 FERC 61,025 (1992).

[36] *See Trunkline Gas Company*, 95 FERC 61,337 (2001).

transmission facilities onshore. We have previously discussed the impracticality of locating processing plants offshore [37] and concluded that, in the offshore context, the absence of processing plants is of little value in assessing the primary function of facilities.

On balance, we find that the North High Island subsystem, upstream of the Block 10 point, performs a gathering function and, accordingly, is exempt from our NGA regulatory oversight. The facilities located downstream of the Block 10 point, however, perform a transmission function and, thus, remain subject to our NGA oversight.

The West Cameron subsystem is different than the North High Island subsystem. It consists of a single line made up of approximately 33 miles of 16-inch and 1.75 miles of 12-inch contiguous pipeline. This subsystem displays the characteristics of a transmission line rather than a gathering facility. While the length and diameter of the facility is consistent with other lines found to be gathering, we are not bound by any one characteristic of a facility when determining its primary function. We find that length and diameter do not detract from a determination of transmission.

As to the location of wells along the line, most of them are clustered around the upstream terminus of the facility, the 1.75-mile, 12-inch line. There are other wells attached to the line via a few interconnects. Collecting gas at the terminus of the facility is characteristic of a transmission function, not necessarily a gathering one. The West Cameron subsystem resembles a transportation mainline that receives gas at one end for delivery at its other end to an interconnection with jurisdiction pipeline facilities. The introduction of additional gas via a few smaller branch lines does not take away from the fact that the facility performs a transmission function.

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[37] *See, e.g., EP Operating v. FERC*, 876 F.2d 45, 49 (5th Cir. 1989).

We have found that offshore facilities tend to operate at higher pressures than onshore facilities, regardless of whether their function is gathering or transmission, because of the generally higher wellhead pressures found offshore. The West Cameron operating pressure of 800 to 1,300 psig is not inconsistent with the operating pressures of other offshore systems, but would certainly be considered a transmission function if located onshore. However, since the pressure merely reflects the level of wellhead pressures, we find that the operating pressure, as well as the lack of compression do not, in this instance, prove the primary function of the facilities.

There are also no processing plants located on or connected to the Central Texas facilities. Again, we have previously discussed the impracticality of locating processing plants offshore [38] and concluded that, in the offshore context, the absence of processing plants is of little value in assessing the primary function of facilities.

The configuration of the West Cameron subsystem is that of a single line that connects production in the OCS to the onshore treating and processing facilities. As described previously, there is no central point of aggregation in this subsystem.

We find that the West Cameron subsystem's primary function is that of a transmission facility, not a gathering one. Therefore, if the subsystem is transferred to WGP, it will remain subject to our NGA regulatory oversight.

Protestors want the Commission to delay action here pending the outcome of the court proceedings in Sea Robin and suggest that we adopt the "feeder line test" rather than the primary function test to determine gathering. First, we will not hold this proceeding in abeyance pending the outcome of

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[38] *See, e.g., EP Operating v. FERC*, 876 F.2d 45, 49 (5th Cir. 1989).

the Sea Robin court case. The Commission currently has guidance from the court on how to proceed in distinguishing gathering from transmission on the OCS and we use that guidance in our determination here. Second, we have already addressed the "feeder line" issue in our order on Sea Robin. There, the Commission rejected arguments that, as a result of enactment of the OCSLA, we must adopt a "feeder line" definition of gathering. For the same reasons, we reach the same conclusion here.[39]

Indicated Shippers argue that our OCS Policy Statement established the expectation that, absent changed circumstances, existing offshore facilities are to retain their jurisdictional or nonjurisdictional status under the NGA. We disagree. The OCS Policy Statement is not intended to stand for permanently fixing the present jurisdictional status of offshore facilities. The OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. We find Transco's restructuring and the adaptation of our primary function test in the Sea Robin order on remand qualify as legitimate reasons to revisit the jurisdictional status of Transco's existing offshore facilities.

Indicated Shippers contend that a central factor in determining the primary function of the facilities at issue is the overall business purpose of the system. While we find it useful to look at the nature of the company that owns and operates facilities proposed to be spundown, that is but one of the factors to be considered. Here, Transco is an interstate gas transporter that has gone through restructuring to segregate its previously bundled services. We find that Transco's primary business is that of transportation. However, we also find that the nature of Transco's business, in and of itself, does not disqualify certain of the facilities at issue from a determination of gathering. The Commission, in its primary

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[39] *See* 92 FERC 61,072 at 61,294 (2000).

function analysis, does not consider any one factor to be determinative and recognizes that all factors do not necessarily apply in all situations.

Transco states that Koch Gateway Pipeline Corporation (now Gulf South Pipeline Company, LP) is a joint owner of certain segments of the North High Island subsystem. To the extent that Gulf South co-owns with Transco facilities we have found to be nonjurisdictional, and currently functionalizes its interests in the facilities as transmission, Gulf South's facilities will need to be refunctionalized as gathering for rate and accounting purposes in their next NGA section 4 rate proceeding.[40]

KeySpan wants the Commission to find that Transco's offshore Mobile Bay facilities are also nonjurisdictional. Since the jurisdictional status of those facilities is not before us in this Docket, KeySpan's request is denied.

C. Environmental

Finally, we conclude that approval of the proposed abandonment will not constitute a major federal action significantly affecting the quality of the environment.

At a hearing held on July 25, 2001, the Commission on its own motion received and made a part of the record in these proceedings all evidence submitted, including the applications and petitions and exhibits supporting the sought authorizations, and after consideration of the record,

The Commission orders:

(A) In Docket No. CP01-103-000, Transco is granted permission and approval under NGA section 7(b) to abandon by sale to WGP, its interests in the North High Island/West Cameron facilities, as described more fully in this order.

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[40] *See CNG Transmission Corp.*, 67 FERC 61,330, at 62,178 (1994); Southern Natural Gas Company, 79 FERC 61,076 at 61,380 (1997); and *Natural Gas Pipeline Company of America*, 95 FERC 61,317 (2001).

(B) In Docket No. CP01-104-000, the Commission declares that upon acquisition by WGP, only the North High Island subsystem facilities located at or upstream of the North High Island Block 10 interconnect will be deemed gathering facilities exempt from the Commission's jurisdiction under the NGA. The remainder of the North High Island subsystem and all of the West Cameron subsystem are and will be transmission facilities subject to the Commission's NGA jurisdiction.

(C) Transco shall notify the Commission within 10 days of the date of abandonment of the facilities described above.

(D) Transco is authorized to abandon its Rate Schedule X-143 transportation service to ANR Pipeline Company, its Rate Schedule X-143 transportation service to Columbia Gulf, as well as the affected receipt points under its Part 284 agreement with Motiva Enterprises, LLC, provided they are services rendered through or are facilities that are part of those found to be gathering and will be abandoned to WGP.

(E) Consistent with Section 154.303(c)(2) of our regulations, Transco is directed to adjust its rates to remove the cost of the North High Island/West Cameron facilities in its current rate proceeding in Docket No. RP01-245- 000.

(F) The protests in this proceeding are denied.

By the Commission.

/s/ David P. Boergers

Secretary.

APPENDIX

Interventions and Protests in Docket No. CP01-103-000

Amerada Hess Corporation

Amoco Production Company and BP Energy Company

Anadarko Petroleum Corporation

Atlanta Gas Light Company and Virginia Natural Gas Company

Baltimore Gas and Electric Company

Burlington Resources Oil & Gas Company L.P.

Chevron U.S.A. Inc.

Consolidated Edison Company of New York [al]

Dynegy Marketing and Trade

El Paso Merchant Energy, L.P.

Exxon Mobil Corporation

Indicated Shippers [al]

KeySpan Delivery Companies [al]

Motiva Enterprises LLC

National Fuel Gas Distribution Corporation

Occidental Energy Marketing, Inc.

Piedmont Natural Gas Company, Inc.

Producer Coalition [al] [aal]

Shell Offshore Inc.

Sunoco Inc.[al]

[al] Protests the application.

[aal] Intervention out-of-time.

Superior Natural Gas Corporation and Walter Oil & Gas Corporation [a] [aa]

Texaco Natural Gas Inc.

Transco Municipal Group and the Municipal Gas Authority of Georgia

United Cities Gas Company, a division of Atmos Energy Corporation

Washington Gas Light Company [aa]

Williams Gas Processing-Gulf Coast Company, L.P.

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[a] Protests the application.

[aa] Intervention out-of-time.

APPENDIX

Interventions and Protests in Docket No. CP01-104-000

Amerada Hess Corporation

Amoco Production Company and BP Energy Company

Anadarko Petroleum Corporation

Atlanta Gas Light Company and Virginia Natural Gas Company

Burlington Resources Oil & Gas Company L.P.

Chevron U.S.A. Inc.

Conoco Inc.

Dynegy Marketing and Trade

El Paso Merchant Energy, L.P.

Exxon Mobil Corporation

Indicated Shippers [al]

KeySpan Delivery Companies [al]

Motiva Enterprises LLC

Occidental Energy Marketing, Inc.

Piedmont Natural Gas Company, Inc

Producer Coalition [al] [aal]

Shell Offshore Inc.

Sunoco Inc.[al]

Superior Natural Gas Corporation and Walter Oil & Gas Corporation [al] [aal]

[al] Protests the application.

[aal] Intervention out-of-time.

Texaco Natural Gas Inc.

Transco Municipal Group and the Municipal Gas Authority of Georgia [aaa]

Transcontinental Gas Pipe Line Corporation

United Cities Gas Company, a division of Atmos Energy Corporation

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[aaa] Comments

APPENDIX E

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

[Filed December 19, 2001]

Docket No. CP01-103-001
Docket No. CP01-104-001

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing-Gulf Coast Company, L.P.

ORDER ON REHEARING

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

On August 24, 2001, Transcontinental Gas Pipe Line Corporation (Transco), filed a Request for Rehearing and Limited Stay of the Commission's Order Authorizing Abandonment and Determining Jurisdictional Status of Facilities issued in these dockets on July 25, 2001 (July 25 Order).[1] On August 24, 2001, the Producer Coalition[2] and Indicated Shippers[3] also filed Requests for Rehearing of the

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[1] Transcontinental Gas Pipe Line Corporation, et al., 96 FERC ¶ 61, 118 (2001) (July 25 Order).

[2] The Producer Coalition is an ad hoc group of natural gas producers, made up of Devon Energy Corporation, Dominion Exploration & Production, Inc. Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, and Ocean Energy, Inc. These companies have significant investment in oil and gas exploration and production projects in the Gulf of Mexico and are shippers and marketers of gas on numerous OCS pipelines.

[3] Indicated Shippers is an ad hoc group of companies having an interest in gas transported on the Transco system. In this case, the members of Indicated Shippers are: Amerada Hess Corporation, Amoco Production

July 25 Order. On September 10, 2001, Key Span Delivery Companies, Atlanta Gas Light Company and Virginia Natural Gas Company, Consolidated Edison Company of New York, Inc., Delmarva Power & Light Company, Philadelphia Gas Works, Public Service Electric and Gas Company and Washington Gas Light Company (KeySpan, *et al.*) submitted a response in partial opposition to Transco's requests for rehearing and limited stay.[4]

The July 25 Order approved a request by Transco to abandon facilities located largely offshore Texas and Louisiana, which are part of the North High Island/West Cameron Gathering System, by transfer to its gathering affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP). The July 25 Order also granted, in part, WGP's request that the Commission declare that the facilities it proposes to acquire from Transco will be, upon abandonment by transfer to WGP, gathering facilities and services, exempt from the Commission's jurisdiction under the NGA. The July 25 Order declared that upon acquisition by WGP, only the North High Island subsystem facilities located at or upstream of the North High Island Block 10 interconnect will be deemed gathering facilities exempt from the Commission's jurisdiction under the NGA. The remainder of the North High Island subsystem and all of the West Cameron subsystem are and will be transmission facilities subject to the Commission's NGA

Company, BP Energy Company, Burlington Resources Oil & Gas Company, L.P., Chevron U.S.A., Inc., Exxon Mobil Corporation, Occidental Energy Marketing, Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc.

[4] Under the Commission's Rules of Practice and Procedure, there is nothing which forecloses KeySpan, et al. from responding to a request for stay. Under Rule 713(d) of those Rules, parties are normally precluded from responding to a request for rehearing. 18 CFR § 713(d). However, the Commission has determined that for good cause shown it will accept answers to rehearing.

jurisdiction.[5] The July 25 Order also directed Transco to adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000. This order denies or grants the requests for rehearing, as discussed below.[6] As noted in the July 25 Order, abandonment serves the public interest by permitting Transco to eliminate unnecessary expenses associated with facilities no longer needed to provide certificated services and enables WGP to make efficient use of these same facilities. Granting rehearing on the rate issue serves the public interest by assuring that the jurisdictional rates will continue to be just and reasonable while also preserving the integrity of the Commission's ratemaking policies.

I. Background

The July 25 Order permitted Transco to abandon, by transfer to its affiliate WGB, approximately 217 miles of 4-inch to 30-inch pipeline and other facilities located offshore, in the Galveston area, the High Island area, and the West Cameron area and onshore, in Cameron and Vermillion Parishes, Louisiana. In response to WGB's request, the July 25 Order sought to determine whether the facilities at issue were used primarily to transport gas, and thereby were subject to our jurisdiction under the NGA, or were used primarily to produce or gather gas, and thereby were exempt from our NGA jurisdiction.[7]

To determine the primary function of particular facilities, we consider the criteria articulated in Farmland Industries, Inc., (Farmland).[8] In Farmland, the Commission enumerated

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[5] 96 FERC at 61,461, Ordering paragraph (B).

[6] As the Commission is granting the request for rehearing on the rate issue which is the subject of the motion for stay, the motion is moot.

[7] Section 1(b) of the NGA states that "[t]he provisions of this Act ... shall not apply to . . . the production or gathering of natural gas."

[8] 23 FERC ¶ 61,063 (1983).

several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the placement of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures. In addition to these physical and geographic criteria, the Commission also considers the purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act. We do not consider any single factor to be determinative and recognize that all factors do not necessarily apply in all situations.

The Commission has modified this primary function test for facilities located offshore. In 1990, in Amerada Hess Corporation (Amerada Hess),[9] we observed that as a result of "recent advances in engineering and available technology, offshore drilling operations continue to move further offshore and further from existing interstate pipeline interconnections."[10] Given the increasingly remote location of such offshore facilities, we found that offshore pipelines used to produce or gather gas may be larger and longer than onshore pipelines that perform the same function. Therefore, we found it appropriate to modify the application of the primary function test for offshore facilities, stating our intention to, "in effect, apply a sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters."[11]

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[9] 52 FERC ¶ 61,268 (1990).

[10] *Id.*, at 61,988.

[11] *Id.*

In Sea Robin Pipeline Company (Sea Robin),[12] we reformulated the primary function test with respect to offshore facilities by (1) adopting an additional analytical element applicable to systems that contain a centralized aggregation point; (2) adjusting the weight to be afforded the "behind-the-plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors, and; (3) focusing primarily on physical factors.

The July 25 Order, in considering the primary function of the subject facilities, applied the Farmland test as modified in Amerada Hess and as reformulated in Sea Robin. As to the North High Island subsystem, the Commission found that: (1) the North High Island subsystem is configured in the shape similar to an inverted "Y" with the legs branching out from the High Island Block 10 central aggregation point; (2) consistent with Sea Robin, the legs upstream from the central points intersect with supply laterals throughout their length; (3) the length and diameter of the numerous pipelines are consistent with offshore gathering facilities; (5) the wellhead pressures are typical of a gathering function; (6) the absence of processing plants is of little value in assessing the primary function of facilities. Accordingly, the Commission concluded that the "primary function" of the facilities located at or upstream of North Padre Block 956 and Brazos Block 538 High Island Block 10 is gathering. As to the West Cameron subsystem, the Commission found that: (1) the West Cameron subsystem resembles a transportation mainline that receives gas at one end for delivery at the other, (2) operating pressure and lack of compression are of little value in assessing the primary function of facilities. Accordingly, the

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[12] 71 FERC ¶ 61,351 (1995), *order on reh'g*, 75 FERC ¶ 61,332 (1996), *remanded sub nom. Sea Robin v. FERC*, 127 F. 3d (Fifth Cir. 1997), *reh'g denied* (February 2, 1998), *order on remand*, 87 FERC ¶ 61,384 (1999), *order denying reh'g*, 92 FERC ¶ 61,072 (2000), *order denying stay*, 92 FERC ¶ 61,217 (2000).

Commission concluded that the "primary function" of the entire West Cameron subsystem is transmission.

II. Requests for rehearing

A. Whether the abandonment of the North High Island and West Cameron facilities is in the public interest.

1. Interests of shippers and the public

Indicated Shippers state that the Commission's finding that it has no discretion to withhold authorization for the transfer of facilities, when it believes that the primary function of the facilities is gathering, is not correct.[13] Indicated Shippers state that Section 7 of the NGA makes clear that the Commission's first duty is to protect the interests of shippers and the public, rather than to accommodate Transco's and WGP's corporate objectives.

Indicated Shippers point out that the abandonment would remove certain receipt points from those available to IT-feeder shippers that ship under Transco's tariff to FT shippers. Indicated Shippers state that the public interest is not served by the unilateral termination or degradation of existing firm services or by the abandonment of IT-feeder facilities to an un-regulated affiliate. Indicated Shippers state that producers and other shippers have relied for decades on the Commission's regulation of the entirety of Transco's offshore pipeline system. Indicated Shippers state that the public interest is not served by undermining these expectations by reversing decades of prior regulatory practice. Further, Indicated Shippers state that dividing this operationally integrated system into separate regulated and unregulated parts is not in the public interest because it could undermine the Commission's open access policies.

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[13] 96 FERC at 61,454.

Indicated Shippers state that Transco's abandonment application is grounded on the theory that, because Transco no longer provides bundled sales service, Transco's gathering services must be freed from the Commission's regulations in order to be able to compete with exempt gatherers. Indicated Shippers state that Transco has presented no evidence to support a finding that it has been unable to compete with non-NGA-regulated gathering companies. Indicated Shippers state that Transco is not concerned over whether it will be able to effectively compete in the marketplace with exempt gathers. Rather, Indicated Shippers state that Transco's real concern is over whether it will be able to take advantage of its existing control of the market in order to exact monopoly rents from shippers.

Commission response

We reaffirm our conclusion that the abandonment is required and in the public interest. As stated in the July 25 Order, where facilities are found to be used primarily in production or gathering, section 1(b) of the NGA directs that they be excluded from our NGA regulatory jurisdiction.[14] As further stated in the July 25 Order, the abandonment is consistent with unbundling policies of Order No. 636, and should, in the long run, promote competition.[15] Under the Outer Continental Shelf lands Act (OCSLA),[16] WGP will be prevented from discriminating against any shipper that seeks access to these facilities. Further, as noted in the July 25 Order, section 330.2 of our OCSLA regulations requires that WGP report the terms under which it provides service to its shippers.[17] The Commission will continue to employ its NGA authority to ensure that Transco's jurisdictional rates remain

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[14] 96 FERC at 61,455.

[15] 96 FERC at 61,455.

[16] 43 U.S.C. 1301-1356.

[17] 96 FERC at 61, 455.

just and reasonable. And, Transco's existing tariff standards prevent it from acting in a discriminatory manner.[18] WGP has agreed to continue to serve Transco's existing customers following the facilities' transfer. This should avoid any abrupt disruption to Transco's customers' expectations.

Independent entities engaged in different aspects of gas development, production, gathering, transporting, and delivery to end users are able to negotiate and rely on contractual capacity and scheduling commitments to guarantee the efficient movement of gas. Because we expect WGP, like all other offshore gatherers, will prove able to enter into service agreements with Transco, and any other transmission pipelines it may rely on, to take timely deliveries of its anticipated gas volumes, we see no need for Transco to retain ownership of its upstream gathering facilities to ensure the orderly flow of gas into its downstream transmission mainlines.

2. Effect on cost of moving gas to shore

Indicated Shippers complain that the July 25 Order transforms a single IT-feeder rate into rate-stacked charges for WGP's gathering and Transco's transmission services. Indicated Shippers state that without the constraint of rate regulation under the NGA, WGP will be able to charge shippers whatever the market will bear. Indicated Shippers state that there are no interconnections with other pipelines at the point at which the Commission finds that gathering ends and transmission begins, so shippers using the gathering facilities have no choice but to utilize Transco's remaining downstream IT-feeder transmission facilities to access Transco's mainline. Indicated Shippers state that it is not enough to say that the procedural safeguards of the OCSLA will adequately protect shippers from the market power of Transco and WGP.

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[18] 96 FERC at 61,455.

Commission response

Prior to abandonment, shippers are effectively paying Transco a transportation rate that includes gathering. That gathering service will be unbundled and provided by WGP. WGP's acquisition of Transco's facilities will necessarily subject shippers on these facilities to both a gathering and a transportation charge, where before such shippers were subject to a single Transco transportation rate. The Commission acknowledges that after the transfer of the facilities, shippers may pay a higher combined gathering fee and transportation charge to move gas between specific receipt and delivery points than the rate they now pay for bundled gathering and transportation service between the same points. However, this is neither inequitable nor an unwarranted rate stacking. As discussed in Order No. 636, it is appropriate to segregate and charge separate rates for separate services, rather than continue to compel shippers to pay a bundled charge for several distinct services.

The Commission will continue to employ its NGA authority to ensure that Transco's rates remain just and reasonable. Regarding WGP's facilities, although no State agency has authority, these facilities remain subject to federal oversight under the OCSLA. Though the OCSLA does not provide for rate regulation equivalent to that of the NGA, shippers are assured open and nondiscriminatory access to WGP's facilities. Onshore, and in state waters offshore, shippers on NGA-exempt facilities can appeal to state authorities to monitor WGP's operations. In the event a shipper believes either Transco or WGP violates its statutory obligations under the OCSLA, the Commission encourages that shipper to submit a complaint to the Commission describing the alleged violation.[19]

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[19] 18 CFR § 385.206 (2001).

B. Challenges to the primary function test

1. Should the Commission apply the OCSLA "feeder line" test instead.

Producer Coalition states that because of the close relationship between the OCSLA, the principal federal statute governing the OCS, and the NGA, the Commission should accord significant weight to legislative intent in formulating the jurisdictional test for OCS pipelines. Producer Coalition states that Congress has addressed the nature of gathering operations on the OCS in the 1978 OCSLA Amendments.[20] Producer Coalition states that, throughout the consideration of OCS pipeline issues, Congress equated "gathering" lines with "feeder" lines and concluded that such lines end where gas is "first separated, dehydrated or otherwise processed" on an OCS platform.[21] Producer Coalition states that the Commission erred in failing to accord the definition of gathering from the OCSLA Amendments of 1978 significant weight in its jurisdictional test. Producer Coalition states that the North High Island facilities are properly classified as jurisdictional transportation systems under the "feeder line" test.

Commission response

The Commission does not consider Congress' discussions of proposals to modify the OCSLA as guidance for jurisdictional distinctions under the NGA. The separate statutes, although complementary, have distinctly different scopes. The OCSLA applies to the full range of gas exploration, development, production, gathering, and transportation activities.[22] This is a broader regulatory sweep than the NGA which explicitly exempts facilities used for production, gathering, local distribution, and certain in-state transpor-

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[20] 43 U.S.C. 1301-1356.

[21] 43 U.S.C. § 1334(f)(2).

[22] 43 U.S.C. 1331(q).

tation. It would be inappropriate to rely on definitions and terms of art indigenous to one statute to interpret and enforce the other. Accordingly, the Commission rejects the Producer Coalition's effort to use legislative history associated with the 1978 amendment to the OCSLA as a foundation to argue for a new NGA primary function test.

2. Must Transco demonstrate changed circumstances

The July 25 Order stated that "a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the facilities for purposes of jurisdiction under section 1(b) of the NGA. How pipelines historically functionalized their facilities for rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities."[23] In addition, the Commission also stated that it found "no cause to disallow Transco the right to claim its facilities perform a gathering function, when in the past it may have advocated the facilities function as transmission."[24]

Indicated Shippers state that while historical functionalization alone may not be determinative, the prior treatment of the facilities by both Transco and the Commission should be given presumptive effect in the absence of a showing of changed circumstances. Indicated Shippers state that given Transco's prior arguments to the Commission that the facilities were transmission, Transco should be estopped from now arguing that they are gathering.

Indicated Shippers state that Transco has failed to show a change in circumstance that would demonstrate that the subject facilities are now gathering. Indicated Shippers state that

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[23] July 25 Order at 61,455, citing *Southern Natural Gas Company, et. al.*, 79 FERC ¶ 61,076 at 61,379 (1997).

[24] *Id.*

the Commission offers no reasoned explanation why restructuring served to change the function of Transco's facilities, particularly given that the Commission's prior findings that the facilities are properly treated as transmission was made in conjunction with Transco's restructuring. Indicated Shippers state that Transco itself previously argued that restructuring served to reinforce the fact that all of its pipeline facilities provide a transmission function.

Indicated Shippers state that the Commission's decision here to change the pre-existing functionalization of certified facilities in the shallow waters of the OCS is in direct conflict with the OCS Policy Statement that indicates that the Commission would preserve the existing status of interstate pipeline facilities in the shallow water of the OCS.

Commission response

The OCS Policy Statement was explicit that "existing interstate pipelines and gathering facilities would retain their status barring some change in circumstances."[25] Nevertheless, the OCS Policy Statement must be read in light of the subsequent opinion in Sea Robin v. FERC, which determined that nonphysical factors such as ownership and prior certification are considerations secondary to physical factors.[26] In any event, the OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. The July 25 Order accepted Transco's claim that reclassification is merited as a response to Order No. 636. As the July 25 Order noted, after Order No. 636 many interstate pipeline companies found portions of their system's facilities

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[25] Gas Pipeline Facilities and Services on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 at 61,757 (1996), *order dismissing reh'g*, 75 FERC ¶ 61,291 (1996) (OCS Policy Statement).

[26] 123 F.3d at 371.

were no longer required in order to provide certain certificated services. Where we found such facilities were employed to gather gas supplies needed to ensure a pipeline's capability to fulfill merchant sales obligations, a function that is no longer offered, we permitted pipelines to abandon such facilities.[27]

Second, Order No. 636 aside, a pipeline company can submit an abandonment application at any time, and the Commission will consider the reasons presented for requesting a review of the company's facilities' classification. We have acknowledged that the facilities were constructed, owned, and operated by Transco, historically an NGA-regulated interstate transportation provider. Nevertheless, we found that changed circumstances, principally Transco's reorganization in response to Order No. 636, tempered this indicator that the facilities were dedicated to interstate transportation.

3. Does the Central point of aggregation factor create a single factor test

As stated earlier, in Sea Robin, the Commission reformulated the modified primary function test adding a new "centralized aggregation point" factor for determining the jurisdiction of facilities on the OCS.

In Sea Robin the Commission found that gathering ends and transmission begins at the point where two or more segments of an OCS pipeline join for the last time and a single line moves natural gas towards shore.[28] The Commission refers to this as the "centralized collection point," or "central aggregation point," which is the point at which the gas collection/aggregation process on an OCS interstate pipeline ends.

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[27] 96 FERC at 61,454 (footnote omitted).

[28] *Sea Robin*, 87 FERC at 62,430-431.

Indicated Shippers complain that the Commission's analysis in Sea Robin is inherently flawed. Indicated Shippers state that this new test permits the Commission to find a point on a pipeline where the largest diameter pipeline on the system begins or where all upstream lines converge, and to designate that point as the demarcation point where gathering ends and transportation begins. Indicated Shippers state that this test would essentially eliminate any evaluation of the physical, geographical, and operational factors traditionally considered by the Commission in distinguishing gathering from transportation. Indicated Shippers state that in place of the primary function test, Sea Robin essentially establishes the very type of bright line test for which the Commission was admonished by the Fifth Circuit.[29] Indicated Shippers state that under this test the Commission would look for the central point on a pipeline system without reference to the nature of the upstream facilities and their relationships with producers' wells and other facilities.

Producer Coalition makes a related argument that because three of the factors contained in the modified primary function test produce three mutually exclusive jurisdictional results, the Commission, by necessity, must select one factor to predominate in order to reach a jurisdictional determination. Producer Coalition state that if the Commission gives principal emphasis to the "behind the plant" location of facil ities, all OCS facilities will be declared non-jurisdictional, because all processing plants downstream of OCS pipelines are located onshore.[30] Alternatively, Producer Coalition state

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[29] Citing, *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989).

[30] Because of this fact, Producer Coalition state that the Commission has effectively disregarded the behind-the-plant factor in determining the jurisdictional status of OCS facilities. *Sea Robin II*, 87 FERC 62,428; *Enron Gulf Coast Gathering*, 95 FERC ¶ 61,318; Trunkline Gas *Company, et al.*, 95 FERC ¶ 61,337 (2001); and *Seahawk Transmission Co.*, 95 FERC ¶ 61,342 (2001).

that if the Commission gives principal emphasis to length and diameter of the pipeline, most major OCS systems will be found jurisdictional. Third, Producer Coalition state that if the Commission relies on the "central point of aggregation factor," the great bulk of OCS pipelines will be found non-jurisdictional except for the lines that run from the last major intersection offshore to the onshore terminus of a system. Producer Coalition state that while the other factors contained in the modified primary function test, i.e., (i) location of wells along all or part of the facility; (ii) geographic configuration; (iii) line pressure; and even (iv) the nature of the company that owns and operates the facilities-can be interpreted in a manner to support each of the above jurisdictional results, the results themselves cannot be reconciled with each other. Producer Coalition reason that use of the modified primary function test necessarily involves the selection of one dominant factor, which is determinative of the outcome. Producer Coalition state that that factor, however, becomes the "bright line" standard, which runs afoul of the Fifth Circuit's conception of reasoned decision-making.

Commission response

The above line of arguments largely represents a collateral attack on the Commission's reasoning in Sea Robin and is rejected for that reason. In addition, Indicated Shippers and Producer Coalition misread the July 25 Order. For both the Sea Robin and Transco systems, all relevant criteria of the Farmland test, as modified with respect to offshore facilities, were afforded appropriate consideration. In this case, not all factors pointed to the same primary function—a result commonly encountered in applying our multi-factor test—thereby compelling the Commission to weigh each factor to balance the conflict presented. In the July 25 Order, in addition to the location of points of aggregation, the Commission found that the configuration of the facilities, the lack of compression, and the size and scope of the pipelines also demonstrated a

gathering function.[31] The Commission found that the absence of processing plants was of little value in guiding the determination on the primary function of the facilities.[32] Although the Commission did identify a single, central point of aggregation, the primary function finding did not rest solely on this feature (or on any other single factor) of the system. The claim that under our primary function test, the Commission is compelled to select a single factor and let it dominate to determine jurisdiction, is rejected.

C. Challenges to the application of the primary function test

1. Configuration

Indicated Shippers state that even if the Sea Robin "central point of aggregation" analysis is lawful, the Commission's selection of North High Island Block 10 as the demarcation points is inappropriate. Indicated Shippers states that Map 5W-B reflects the many smaller pipeline facilities forming "Y" configurations along the North High Island system and going out to the actual wells. Indicated Shippers state that the Commission should not ignore the configuration of these upstream facilities, which aggregate gas and provide the gathering function on the system. Indicated Shippers state that the facilities downstream of these smaller lines should be treated as transmission.

Indicated Shippers state that the location of wells, for the most part, appear to be remote from Transco's facilities. Indicated Shippers state that production is brought to Transco in smaller gathering lines. Accordingly Indicated Shippers state that, the gathering function is provided by other parties, whose facilities bring gas to Transco's trunk lines. For example, Indicated Shippers state that the map of the North

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[31] 96 FERC at 61,459.

[32] *Id.*

High Island facilities shows numerous wells, purportedly served by Transco's facilities, that are located off Transco's lines.[33] Indicated Shippers state that Map 5W-B clearly illustrates the numerous small-diameter lines that actually interconnect the wells with the central line. Although Indicated Shippers agree with the Commission's finding that this alone would not disqualify the lines from a finding of gathering this is yet another piece of evidence that supports a finding that the subject facilities are transmission and not gathering.

Commission response

In Sea Robin, the Commission took note of the court's observation that, while the task in a case may be difficult, the Commission must squarely address the fact that the demarcation point between gathering and transmission may be located at a point internal to the overall system.[34] The Commission explained that the most logical demarcation point may be the "coincidence of several smaller lines at a centralized location where the gas carried is delivered into a single, larger-diameter line for further delivery to market."[35] As noted by Indicated Shippers, for every offshore system, there are multiple Y junctions, from the first offshore interconnection point to the junction at which the line furthest seaward is tied back in. The task then is to determine which of these several Y interconnects may merit the distinction of being the point of aggregation at which gathering ceases and transmission starts. A primary function review of the traits of all potential legs and trunks is required.

The 24-inch Line C interconnects in High Island Block 10 with a 12 mile 16- inch line and with three short four-inch

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[33] *See* Abandonment Application, Exhibit Z (map 5W-B).

[34] 92 FERC ¶ 61,072 at 61,290.

[35] 92 FERC ¶ 61,072 at 61,290.

lines. The Commission found that while Line C retains its 24-inch diameter downstream of this point, it nevertheless serves as the central point of aggregation for the subsystem, where all the gas gathered upstream is delivered to a single point for transportation onshore. Although the North High Island Block 10 point does not exhibit as strong an indication of a marked physical change in facilities as was the case in Sea Robin,[36] the Commission found that it functions as an aggregation point that may be interpreted as indicating a demarcation of gathering and transmission functions. The configuration of this point implied a transition from gathering to transmission, a finding that was accepted only after applying the multi-factor methodology to the rest of Transco's facilities.

2. Size

The North High Island subsystem consists of approximately 174 miles of 4 to 30-inch pipeline. The majority of the facilities are relatively small, with the lines ranging from 4 to 24-inches in diameter. Upstream from the Block 10 point, the length and diameter of the numerous pipelines are short and small compared to the facilities found to be gathering in Sea Robin. The West Cameron subsystem is different than the North High Island subsystem. It consists of a single line made up of approximately 33 miles of 16-inch and 1.75 miles of 12-inch contiguous pipeline.

Indicated Shippers state that although *EP Operating Co. v. FERC*,[37] stands for the proposition that the Commission should not improperly overemphasize the length of the pipeline in its primary function analysis, length is still an

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[36] In Sea Robin, the central point of aggregation was a manned offshore platform at which two smaller lines merged into a single larger line, significant compression facilities were located on the platform, and the platform was situated as a point geographically central to the Sea Robin system.

[37] 876 F.2d 46 (5th Cir. 1989).

important factor to consider. Indicated Shippers complain that in the July 25 Order, the Commission failed to take into account the overall length of the pipeline in its determination that the facilities upstream from the Block 10 are gathering. Indicated Shippers state that Seahawk Shoreline System,[38] illustrates that 12-24 inch pipeline facilities can qualify as transmission facilities.

Commission response

The Commission has adopted no bright line test regarding the size of jurisdictional offshore facilities. Although size generally correlates with function, large offshore facilities need not be summarily disqualified from gathering status if the other characteristics of the facilities are indicative of a gathering function.[39] Facilities as large as typical transmission lines may nevertheless be found to be gathering when other primary function factors demonstrate characteristics consistent with gathering.[40] Likewise following review of the Farmland factors, we have also determined that systems smaller than these perform a transmission function.[41]

In this case, the Commission applied the several factors of the primary function test. Not all factors were found to be

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[38] 93 FERC ¶ 61,097 (2000) *order denying reh'g*, 95 FERC ¶ 61,342 (2000).

[39] *See Amerada Hess*, 52 FERC P61,268 (1990) (discussion of and response to EP Operating v. FERC, 876 F.2d 45 (5th Cir. 1989). *See also Viosca Knoll*, (finding a relatively long, large line gathering).

[40] Offshore, a 28-inch diameter line has been found to be gathering. Exxon Corporation, 45 FERC P61,436 (1988). However, that diameter was found in 9.5, 7.9, and 6.1 -mile segments of a 36.7-mile system that was producer owned, carried only sour gas, included no compression, and performed production as well as gathering.

[41] *See, e.g., Louisiana Intrastate Gas Corporation*, 69 FERC ¶ 61,022 (1994) (a system composed of 1.34 miles of 4-inch diameter pipe and 21.94 miles of 16-inch diameter pipe that serves to carry gas from OCS production areas to shore).

relevant or uniform, and certain factors exhibited more value or weight than others. The subject lines' large diameters, a usual indicator of a transmission function, was outweighed by other characteristics denoting a gathering function. The Commission affirms the prior determination that on balance the factors indicate that the facilities to be abandoned perform primarily a nonjurisdictional gathering function.

3. Pressure

Indicated Shippers argue that the pressure ranges of the North High Island facilities located at or upstream of the North High Island Block 10 interconnect, between 800 and 1300 psig, also indicate a transmission function. Indicated Shippers state that these pressure ranges reflect neither the very high nor low operating pressures frequently seen in gathering lines. Indicated Shippers state that the absence of compression does not undermine this view: it simply reflects that compression was unnecessary, and sheds no light on whether the facilities are gathering or transmission.

Commission response

There is no compression located along the North High Island facilities located at or upstream of the North High Island Block 10 interconnect, which means that the systems operating pressures are a function of the wellhead pressures. The wellhead pressures act to push the gas through the facilities, which is typical of a gathering function, unlike compression, which is typical of a transmission function. While these pressures would indicate a transportation function onshore, they must be viewed, here, in the offshore context. These pressures are consistent with the nature of offshore production and comparable to operating pressures of other offshore facilities found to be gathering.[42] Accordingly,

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[42] *See, e.g., Northern Natural Gas Company*, 93 FERC ¶ 61,101 (2000) (offshore facilities operating at pressures between 1,050 and 1,200 psig found gathering) and Tarpon Transmission Company, 78 FERC ¶ 61,278

the Commission affirms the prior determination that the pressure factors indicate that the facilities to be abandoned located at or upstream of the North High Island Block 10 interconnect, perform primarily a nonjurisdictional gathering function.

4. Shallow water factor

Indicated Shippers point out that the OCS Policy Statement[43] provides that new facilities located in water depths of 200 meters or greater will be presumed to be gathering.[44] Indicated Shippers state that the Commission failed to give any weight to the fact that the North High Island facilities located at or upstream of the North High Island Block 10 interconnect do not extend to the deep waters of the OCS.

Commission response

As noted in the July 25 Order, the OCS Policy Statement added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more.[45] The OCS Policy Statement creates a presumption that these deep water facilities are gathering facilities up to the point or points of interconnection with the interstate pipeline grid. There is no corollary rebuttable presumption that facilities located in shallow water are transmission. Rather, the Commission considers a facility's location in shallow water as one among several criteria

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(1997) (offshore facilities operating at pressures between 1,100 and 1,250 psig found gathering).

[43] Gas Pipeline Facilities and Services on the Outer Continental Shelf - Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 (1996), *order dismissing reh'g*, 75 FERC ¶ 61,291 (1996) (Policy Statement).

[44] *Id.* at 61,757.

[45] 96 FERC at 61,456.

in assessing the primary function. While almost all NGA-regulated pipe is located in shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and gathering facilities. Accordingly, a particular facility's placement in shallow water, standing alone, is a poor predictor of that facility's primary function (in contrast, in deep water, almost all facilities are engaged in production or gathering). The shallow water location must be viewed in the context of a facility's other characteristics in order to reach any meaningful assessment of its primary function. In this case, the shallow water location of the subject facilities was not as substantial a factor as the facilities' other characteristics.

5. Integrated Pipeline System

Indicated Shippers believe that the nature of Transco's integrated pipeline system provides strong evidence in support that the primary function of Transco's entire North High Island System continues to be transmission. Indicated Shippers state that there is no reasoned basis to conclude that the primary function of one portion of an integrated system is gathering, and the other is transmission.

Commission response

In Sea Robin the Commission rejected the position that the Commission should consider an entire pipeline system gathering if the "integrated" nature of the system, as a whole, is designed to transport gas from production areas to onshore locations. The Commission explained that such a finding would violate the Commission's responsibility to draw jurisdictional lines, even when the end of gathering is not easily located, as for example, when it occurs at a point internal to an overall system.[46] For the same reason, we reject the

[46] 92 FERC ¶ 61,072 at 61,290.

contention that the integrated nature of Transco's system precludes us from finding that a portion of the system is gathering.

6. Historical certification and business purpose

Indicated Shippers argue that the Commission erred in its conclusion that the historical certification of Transco's facilities is not relevant to the current primary function of the facilities and in failing to give due weight to the business purpose of the subject facilities. Indicated Shippers are in agreement with the Commission in that the "business purpose" of the subject facilities is only one factor to consider in determining the primary function of the facilities. However, Indicated Shippers argue that because the business purpose of the pipeline provides strong evidence of a pipeline's functionalization, it should be considered a central factor. Indicated Shippers argue that where the owner of pipeline facilities is in the business of transportation for hire, and has historically operated the pipeline as an integrated interstate pipeline system, the primary function of the pipeline is most likely transmission.

Commission response

In the past, when a pipeline applied for a certificate to construct facilities, the Commission did not inquire into the pipeline's prospective use of the facilities before issuing the certificate. Consequently, many facilities that actually may perform a gathering function originally were constructed under NGA section 7 certificates. Therefore, until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined.[47]

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[47] *See, CNG Transmission Corporation*, 67 FERC P61,330, at 62,177 (1994).

The offshore facilities at issue here were installed under NGA certificate authority and have continued to be functionalized by Transco as transmission for many years. Nonetheless, in making jurisdictional determinations on the OCS, and indeed, onshore as well, the physical characteristics of the particular pipeline systems are the more significant factors, and each determination must be made on the basis of its own specific fact situation.[48] Here, such non-physical aspects are not compelling enough to overcome the overwhelming physical evidence

D. Challenge to the rate adjustment

Transco seeks rehearing of the requirement that it adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000.[49] Pending the Commission's action on rehearing, Transco also requests that the Commission grant a limited stay of the July 25 Order's rate adjustment requirement. As discussed below, the request for rehearing on this issue is granted. Therefore, the motion for stay is moot.

Transco states that having now received the Commission's Order granting abandonment and transfer, Transco and WGP must make the modifications necessary to permit operation of these facilities on a stand-alone basis, and must negotiate contracts to govern post-spin down services on these facilities. Transco states that for a variety of reasons, it does not believe that such transfer will close until well into 2002, at the earliest.

Transco states that the July 25 Order contains no findings under either NGA Sections 4 or 5 that the subject facilities will not be in service through the test period in Docket No. RP01-245-000, or that Transco's rates to be effective

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[48] *Sea Robin*, 127 F.3d 365 at 371.

[49] 96 FERC at 61,461, Ordering paragraph E.

September 1, 2001, will be unjust or reasonable. Transco states that Section 5(a) requires such findings before the Commission may lawfully adjust a pipeline's rates.[50] Transco states that to require Transco to remove the cost of these facilities from jurisdictional rates while such facilities continue to render jurisdictional service would be unlawful under these NGA sections, which require that a pipeline be afforded an opportunity to earn a fair return on its investment in jurisdictional facilities and to recoup its costs in rendering jurisdictional service.[51]

KeySpan, et al., argue that the timing of the transfer is a matter within the control of the contracting parties and Transco's customers should not be required to continue to pay for facilities that are not necessary to provide their jurisdictional services simply because the transfer has not occurred as expeditiously as Transco had planned.

Commission response

In its application in Docket No. CP01-103-000, Transco proposed to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of [the July 25 Order], or at a mutually agreeable date thereafter. Thus, the transfer was expected to occur as early as August 31, 2001. However, the transfer did not take place at that time. The test period in Transco's current general rate proceeding in Docket No. RP01-245-000 expired on August 31, 2001, and the proposed rates became effective on September 1, 2001.[52] The subject

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[50] 15 U.S.C. 717d(a). Transco cites *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993).

[51] Transco cites *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[52] On March 1, 2001, in Docket No. RP01-245-000, Transco filed revised tariff sheets to reflect a general NGA section 4 rate increase. The Commission exercised its discretion to accept and suspend the rates to take effect on September 1, 2001, subject to conditions and subject to

facilities continue to be owned by Transco, and are being operated under color of a certificate issued by the Commission. The Commission's regulations only require removal of the costs of facilities that will not be in service as of the end of the test period.[53] Hence, the Commission's regulations

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refund and the outcome of a hearing. Transcontinental Gas Pipe Line Corporation, 94 FERC ¶ 61,360 (2001). On August 31, 2001, in Docket No. RP01-245-003, Transco filed a motion to place the suspended tariff sheets into effect on September 1, 2001. Among other things, Transco stated that it had eliminated the costs associated with facilities not in service as of August 31, 2001, but had not reflected any adjustments in the compliance rates for the subject facilities for which abandonment was granted. By order issued September 27, 2001, the Commission accepted the revised tariff sheets to be effective September 1, 2001, subject to refund, the outcome of the hearing established in Docket No. RP01-245-000, and the certificate proceedings in Docket Nos. CP01-34-000, CP01-103-000 and CP01-368-000. *Transcontinental Gas Pipe Line Corporation*, 96 FERC ¶ 61,345 (2001) (September 27 Order). The Commission also directed Transco to file revised tariff sheets, within 15 days of the date of issuance of that order, reflecting the removal of the costs of the facilities abandoned in the certificate proceedings.

On October 9, 2001, in Docket No. RP01-245-005, Transco filed a Request For Clarification Or, In The Alternative, For Rehearing, of the September 27 Order (October 9 Request). Transco also requested a limited stay that sought an extension of time within which to comply with the September 27 Order. The motion states that because Transco's books and records would have to be reconstructed in order to calculate the costs required by the Commission's Order, compliance is not possible within the 15-day deadline. On November 6, 2001, an extension of time was granted until 30 days after the Commission acts on Transco's October 9 Request. The Commission order in Docket No. RP01-245-005 is being issued concurrently with the instant order.

[53] Section 154.303(c)(2) of the Commission's regulations states:

> When a pipeline files a motion to place the rates into effect, the filing must be revised to exclude the costs associated with any facilities that will not be in service as of the end of the test period ... At the end of the test period, the pipeline must remove from its rates costs associated with any facility that is not in service . . .

and ratemaking policies did not require that Transco remove the cost of those facilities and costs from the rates that went into effect on September 1, 2001, subject to refund. Accordingly, rehearing is granted. The order in Docket No. RP01-245-005, issued concurrently with the instant order, discusses the effect of the refunctionalization of the subject facilities to gathering on Transco's rates.

Nonetheless, the Commission's finding in the July 25 Order that Transco must remove the costs of the facilities that it will abandon from its prospective rates was grounded on the sound ratemaking principal that just and reasonable jurisdictional rates cannot be based on the costs of facilities not owned by the pipeline, not in service, and not needed to provide service to jurisdictional customers. Thus, it would seem unjust and unreasonable for Transco to continue to charge rates designed to afford Transco the opportunity to recover the cost of and earn a fair return on an investment in the subject facilities at such time that it no longer owns them and no longer uses them to provide jurisdictional service. Accordingly, we shall direct Transco to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned facilities, 30 days prior to the effective date of the transfer of the subject facilities.

III. Request for clarification

Indicated Shippers ask that the point at which gathering ends and transmission begins be better identified than in the July 25 Order. Indicated Shippers state that simply identifying a particular platform is not sufficient because a more specific identification becomes critical for new interconnections to the platform. Indicated Shippers state that if Transco deems the interconnect to be upstream of the point of demarcation between gathering and transmission, the pipeline

and its affiliate could argue that a gathering fee must be paid for a very short haul of gas from one point on the platform to another. In order to avoid this sort of rate stacking, Indicated Shippers request that the Commission clarify that all of the facilities at the platform at which gathering ends are to be treated as transmission; and, only facilities upstream of the platform should be gathering. In this way Indicated Shippers state that, there will be no question that new interconnects at the platform will not bear a gathering charge for short hauls on the platform.

Commission response

The Commission clarifies that facilities upstream of the jurisdictional demarcation platform have been found to be gathering, and facilities downstream have been found to be transmission. However, the Commission denies the request to clarify that all of the facilities at the jurisdictional demarcation platform are to be treated as transmission. An OCS platform may be constructed to serve many functions, such as an aggregation point for numerous lines, and/or to provide separation, dehydration, and other production and transmission services. Basically, facilities on the platform involved with bringing gas to the platform are gathering and facilities involved in sending gas toward shore are transmission. Facilities that separate or dehydrate are also performing production and gathering functions. Although unusual in offshore situations, compression facilities would most likely be involved in transmission. New interconnections to the platform should be functionalized accordingly.

The Commission orders:

(A) The requests for rehearing are granted or denied as discussed in this order.

(B) Pursuant to section 5 of the Natural Gas Act, Transco is directed to show cause, within 30 days from the date of issuance of this order, why it should not be

required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned facilities, 30 days prior to the effective date of the transfer of the subject facilities.

(C) Within 15 days after WGP acquires the subject facilities deemed gathering, WGP must file an OCSLA Reporting Form and the conditions of service for each shipper served with respect to the acquired facilities (and the services rendered through those facilities) and continue to do so thereafter, in accordance with section 330.3 of the Commission's regulations.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.,
Acting Secretary.

APPENDIX F

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

[Filed July 25, 2001]

Docket No. CP01-34-000
Docket No. CP01-32-000

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing-Gulf Coast Company, L.P.

ORDER AUTHORIZING ABANDONMENT AND DETERMINING JURISDICTIONAL STATUS OF FACILITIES

Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, Linda Breathitt, Pat Wood, III and Nora Mead Brownell.

On November 20, 2000, Transcontinental Gas Pipe Line Corporation (Transco) submitted an application in Docket No. CP01-34-000, pursuant to section 7(b) of the Natural Gas Act (NGA), seeking Commission approval to abandon facilities comprising portions of the North Padre Island Gathering System (North Padre System) and the Central Texas Gathering System (Central Texas System) located offshore Texas by transfer to its gathering affiliate, Williams Gas Processing- Gulf Coast Company, L.P. (WGP). On the same date, WGP submitted a petition in Docket No. CP01-32-000 requesting that the Commission declare that the facilities it proposes to acquire from Transco will be, upon abandonment by transfer to WGP, gathering facilities and services, exempt from the Commission's jurisdiction under the NGA.

For the reasons discussed below, we will approve Transco's requested abandonment and declare the facilities to be gathering.

I. Background and Proposal

The requested abandonment is part of an ongoing corporate-wide restructuring by The Williams Companies, Inc. (Williams), the corporate parent of Transco and WGP, to abandon and transfer (spindown) gathering facilities from Transco and the other Williams-affiliated interstate pipelines into nonjurisdictional gathering companies. The facilities under consideration in these dockets were part of a more comprehensive gathering spindown request filed by Transco and WGP in Docket Nos. CP96-206-000 and CP96-207-000.[1] Those applications were dismissed without prejudice to the applicants' filing another proposal addressing discrete portions of the facilities.[2] Transco states that it has reviewed its gathering facilities on a system-by-system basis under the Commission's primary function test in Sea Robin.[3] Transco states that this application represents its first proposal to spindown gathering facilities under the principles of Sea Robin.

Transco states that as a result of the proposed abandonment of these facilities, service provided by Transco under two Part 284 firm transportation agreements with Sun Company Inc. and Texaco Refining and Marketing, Inc. (converted from section 7(c) individually certificated services) must be partially abandoned and the seven affected source/receipt points

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[1] *Transcontinental Gas Pipe Line Corporation*, 76 FERC ¶ 61,317 (1996), order denying reh'g, 95 FERC ¶ 61,396 (2001).

[2] *Id.* at 62,543.

[3] *Sea Robin Pipeline Company*, 71 FERC ¶ 61,351 (1995), order on reh'g, 75 FERC ¶ 61,332 (1996), remanded *Sea Robin v. FERC*, 127 F. 3d 365 (5th Cir. 1997), reh'g denied (February 2, 1998), order on remand, 87 FERC ¶ 61,384 (1999), order denying reh'g, 92 FERC ¶ 61,072 (2000), order denying stay, 92 FERC ¶ 61,217 (2000) (Sea Robin).

from the corresponding FT Service Agreements must be deleted. In addition, Transco requests abandonment authorization for Rate Schedule X-66 to remove the points from the affected firm transportation contracts and to terminate the portion of such services from the receipt/source points affected by this application. Transco states that the primary term of Rate Schedule X-66 expired in 1993. Moreover Transco states that gas has not flowed under Rate Schedule X-66 since 1989; consequently, there is no longer a need for this service. Transco states that upon approval of this abandonment application, Transco will file the necessary conforming changes to its FERC Gas Tariff, such as the termination of Rate Schedule X-66 tariff sheets and removal of reference to the abandoned facilities in Transco's tariff.

Transco's proposes to transfer the subject facilities to WGP pursuant to the Transfer and Assignment Agreement dated February 19, 1996, as amended on December 29, 1997, at net book value at the time of closing, resulting in no gain or loss to Transco. Following a Commission order approving abandonment acceptable to Transco and WGP, Transco proposes to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of such order, or at a mutually agreeable date thereafter. Transco will notify the Commission within ten (10) business days of the transfer of the facilities. Transco states that if this abandonment is approved prior to Transco's next general section 4 rate case filing, then in accordance with Transco's rate settlement in Docket Nos. RP97-71-000, *et al.*, Transco will make a rate filing as necessary to reflect the spindown after Commission approval. Transco states that the depreciated net book value of these facilities is approximately $34,893,250 as of October 31, 2000.

Transco states that the application to abandon and transfer the North Padre and Central Texas gathering systems is

consistent with Williams' ongoing corporate restructuring, whereby the gathering facilities of Williams' interstate pipelines have been unbundled and spundown to companies focused on providing gathering services. Transco states that the spindown of gathering facilities by Williams' interstate pipelines, other than Transco, is largely complete. The Commission has approved those prior spindowns, finding that they will serve the public interest and are consistent with the Commission's industry restructuring and pro-competitive policies. Transco states that for the same reasons, the Commission should likewise approve the instant application.

Transco states that it has either notified or has caused the notification of the affected parties of its intent to terminate and abandon the affected services. Transco states that WGP is currently operating the subject facilities as Transco's agent and WGP plans to negotiate post-spindown service agreements with all shippers. Transco states that WGP will continue to operate the facilities in an open and nondiscriminatory manner. In that regard, while the spundown facilities will not be subject to the Commission's NGA jurisdiction, the facilities are subject to the Outer Continental Shelf Lands Act (OCSLA),[4] which mandates that all Outer Continental Shelf (OCS) pipelines provide "open and nondiscriminatory access" to their OCS facilities.[5]

In prior spindown cases, the Commission has required the pipeline to adopt tariff provisions ensuring that it will not provide any undue preference to affiliates. Transco states that Section 36 of the General Terms and Conditions of Transco's tariff already includes such provisions.

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[4] 43 U.S.C. § 1331, *et seq.*

[5] 43 U.S.C. § 1334 (f)(1)(A).

II. Description of facilities

Transco states that the North Padre facilities proposed to be abandoned include only offshore facilities which are located in the North Padre Island Area and the North Padre Island Area East Addition. The facilities comprising the North Padre system to be abandoned consist of 3.83 miles of 10-inch pipeline and 18.79 miles of 20-inch pipeline. Transco states that these facilities gather and move gas onto Transco's 24-inch lateral (which is not part of this application) and into the Padre Island Plant onshore in Brooks County, Texas.

Transco states that the Central Texas system consists of only offshore facilities located in the Galveston Area, Brazos Area, Brazos Area South Addition, Matagorda Island Area and Mustang Island Area East Addition. The pipeline facilities in the Central Texas system to be abandoned are:

4.96 miles of 6-inch pipeline

4.19 miles of 8-inch pipeline

3.77 miles of 10-inch pipeline

64.79 miles of 12-inch pipeline

11.56 miles of 16-inch pipeline

116.48 miles of 20-inch pipeline

23.42 miles of 24-inch pipeline

41.15 miles of 30-inch pipeline

Transco states that these facilities gather and move gas onto Transco's Block 538 Junction Platform and into Transco's 30- inch and 36-inch lines (which are not part of this application), where the gas is moved to the Markham Separation and Dehydration Plant located in Matagorda County, Texas. Transco states that certain segments of the Central Texas pipelines are jointly-owned facilities.

Transco states that the North Padre and Central Texas facilities proposed to be abandoned include a number of valves, meters and related appurtenant facilities located throughout the systems. Transco states that these related facilities constitute an integral part of the non-jurisdictional gathering function of the facilities sought to be abandoned and are also proposed to be abandoned and declared nonjurisdictional.

Transco states that most of the facilities comprising the North Padre and Central Texas systems are the subject of various NGA section 7 (c) certificates issued by the Commission. Transco states that at the time they were acquired or constructed, the North Padre and Central Texas facilities were used almost exclusively to deliver system supply gas to support bundled sales services. Transco states that under the historic structure, Transco did not have a need to precisely distinguish between jurisdictional transmission and exempt gathering facilities. Therefore, Transco states, the fact that many of the subject facilities were constructed pursuant to NGA certificates is not an indication of whether the facilities actually qualify for exempt gathering status under section 1(b) of the NGA. Transco states that in numerous orders, the Commission has acknowledged that the historical functionalization and certification of facilities was dictated by the nature of the prior bundled service structure and those historic classifications are not determinative of jurisdictional status under the primary function test.[6]

III. WGP's Petition for Declaratory Order

WGP states that both the North Padre and the Central Texas gathering systems should be found to function as

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[6] Transco cites *Cavallo Pipeline Co.*, 71 FERC ¶ 61,053 at 61,198 (1995); *CNG Transmission Corporation*, 68 FERC ¶ 61,104 at 61,578 (1994); *Natural Gas Pipeline Company of America*, 68 FERC ¶ 61,339 and 62,359 (1994).

gathering under the primary function test, including the Commission's reformulated factors in Sea Robin.

A. North Padre Island System

The North Padre facilities to be spundown consist of two small offshore legs that meet at a common point in the OCS where they both deliver gas into a Transco pipeline. As stated above, one leg consists of 3.83 miles of 10-inch pipeline that begins (on the upstream end) in North Padre Island Block 967 and ends at North Padre Island Block 956. The other leg consists of 18.79 miles of 20-inch pipeline that begins in East Addition Block A-42 and also ends at North Padre Island Block 956. WGP states that the gas collected is produced at various points offshore for ultimate delivery to Transco's onshore separation and dehydration facilities. The facilities consist of 22.62 miles pipelines: 3.83 miles of 10"pipe and 18.79 miles of 20" pipe.

WGP states that the North Padre facilities should be declared nonjurisdictional gathering facilities because: (1) the lengths of the two pipelines are short and the diameters are small; (2) numerous wells are located throughout the length of the lines; (3) the operating pressures are consistent with offshore gathering; (4) there are no compression or processing facilities on the system; (5) the system is configured in an inverted "Y," which is consistent with that found to be gathering in Sea Robin; and (6) the facilities do not extend beyond the system's central aggregation point.

WGP points out that there are three reformulated aspects of the primary function test articulated in Sea Robin: 1) The centralized aggregation point; 2) an adjustment in the weight afforded the behind the plant criterion; and 3) a primary focus on physical factors. WGP states that the centralized aggregation point is clearly the point where North Padre system ends—North Padre Island Block 956. WGP states that, just as in Sea Robin's remand order, this is the point where the two

legs converge into a single line (24-inch) that transports the gas to shore. WGP states that the gas gathered in the North Padre gathering system is neither processed nor pipeline quality until it reaches the separation and dehydration plants onshore, so to the extent the Commission considers the behind the plant factor, it weighs in favor of a gathering determination.

B. Central Texas Gathering System

The Central Texas gathering system is located offshore Texas in OCS waters and consists primarily of two sets of pipelines that meet at a common point at Brazos Area Block 538, where the gas then enters a set of trunk lines for transportation to onshore processing facilities. In addition, the system includes two small stub laterals that extend off of the system's trunklines.[7] At Brazos Area Block 538 where the two legs converge, there is a platform that contains valve manifolds and mechanical "pig" launchers and receivers. The facilities consist of 270.32 miles of 2-inch to 30-inch diameter pipelines.

WGP states that the Central Texas facilities should also be declared nonjurisdictional gathering facilities because: (1) the length and diameter of the pipelines are relatively small; (2) numerous wells are located throughout the system; (3) the operating pressures are consistent with offshore gathering; (4) there are no compression or processing facilities on the system; (5) the system configuration resembles an inverted "Y," or "T;" and (6) the facilities do not extend beyond the system's central aggregation point.

WGP states that most of the Central Texas facilities also qualify as gathering under the central aggregation point test

[7] All of the facilities subject to this Petition are located entirely in Federal OCS waters with the one exception of the 6-inch stub referred to here which is located partially in Texas state waters.

relied on in Sea Robin. WGP states that the Central Texas System is characterized by two sets of pipelines that converge at Brazos Block 538, which constitutes the system's central aggregation point. All of the facilities to be spundown are upstream of, and feed into, that central aggregation point, with the exception of two small, noncontiguous, stub lines that feed directly into the main trunk of the system. WGP states that those stub lines are short (i.e., the longest line segment is 5.63 miles) and small in diameter (i.e., segments of 6-inch, 8-inch, and 12-inch line) and collect gas from platforms and production lines. Thus WGP states, the upstream legs as well as the two stub laterals exhibit the characteristics of gathering facilities.

IV. Interventions and Protests

Transco's application for abandonment authorization in Docket No. CP01-34-000 was published in the Federal Register on December 6, 2000.[8] Timely, unopposed motions to intervene were filed by companies as listed in the Appendix.[9] Atlanta Gas Light Company and Virginia Natural Gas Company, Piedmont Natural Gas Company, Inc., Producer Coalition, Public Service Electric and Gas Company, Sunoco Inc. (R&M), Superior Natural Gas Corporation and Walter Oil & Gas Corporation (Superior/Walter), United Cities Gas Company, a division of Atmos Energy Corporation, and Williams Gas Processing-Gulf Coast Company, L.P. filed untimely motions to intervene. We find that granting the motions to intervene out-of-time will not delay the proceeding, prejudice the rights of any party, or place an additional burden on existing parties. Accordingly, for good cause shown, we will grant the late-filed motions to

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[8] 65 FR 76226.

[9] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2000).

intervene.[10] Indicated Shippers, KeySpan Delivery Companies, Producer Coalition, Sunoco Inc. (R&M), Superior/Walter, and Tennessee Gas Pipeline Company filed protests. The Transco Municipal Group and the Municipal Gas Authority of Georgia filed comments.

WGP's petition for a declaratory order in CP01-32-000 was published in the Federal Register on December 6, 2000.[11] Timely, unopposed motions to intervene were filed by companies as listed in the Appendix.[12] Atlanta Gas Light Company and Virginia Natural Gas Company, Piedmont Natural Gas Company, Inc., Producer Coalition, Sunoco Inc., Superior/Walter, Transcontinental Gas Pipe Line Corporation, and United Cities Gas Company, a division of Atmos Energy Corporation filed untimely motions to intervene. We find that granting the motions to intervene out-of-time will not delay the proceeding, prejudice the rights of any party, or place an additional burden on existing parties. Accordingly, for good cause shown, we will grant the late-filed motions to intervene.[13] Indicated Shippers, Producer Coalition, Sunoco Inc., Superior/Walter, and Tennessee Gas Pipeline Company filed protests.

On March 8, 2001, Transco and WGP filed an answer to the protests. On April 16, 2001, KeySpan filed a response to the answer. On June 4, 2001, Transco and WGP filed a separate answer to Tennessee's protest. Although our procedural rules do not permit answers to protests, or answers to answers, we may, for good cause, waive this provision.[14]

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[10] 18 CFR § 385.214(d) (2000).

[11] 65 FR 76227.

[12] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2000).

[13] 18 CFR § 385.214(d) (2000).

[14] 18 CFR § 385.213(a)(2) (2000).

We find good cause to do so in this instance in order to insure a complete and accurate record in this proceeding.

We address the substance of the protests and responsive pleadings below.

V. DISCUSSION

A. Abandonment

Since the facilities proposed to be abandoned were certificated to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the abandonment of Transco's certificated interests in the OCS facilities requires Commission authorization under NGA section 7(b).

Transco historically designed, constructed and operated its systems in order to perform a bundled service—purchasing and aggregating gas supplies and transporting those supplies for sale to local distribution companies at the city gate. However, since the reconstruction of the natural gas industry, Transco provides an array of unbundled services, such as transportation, storage, and fully unbundled sales services, to a wide variety of customers. In its principal role as a transporter, Transco no longer requires its extensive gathering facilities to provide gas sales. Moreover, most of Transco's sales are made at its pooling points, not at the wellhead. Approval of the proposed abandonment will permit Transco to eliminate unnecessary expenses associated with these facilities and we expect WGP will make efficient use of the acquired facilities to provide open access gathering service. Accordingly, we find the public convenience and necessity permit Transco to abandon by transfer to WGP the portion of the offshore North Padre and Central Texas Systems described herein.

B. Opposition to the Abandonment

Various parties oppose the abandonment arguing that the facilities have and continue to perform a transmission function, and that transfer of the facilities to WGP will result in a lack of competitive alternatives and allow WGP to wield substantial market power over shippers.

1. Impact on Existing Shippers

Indicated Shippers, an ad hoc group of companies interested in gas transported on Transco's system,[15] object that the proposal would undo decades of Commission jurisdiction over the entirety of Transco's system and may permit the Transco corporate family to impose rates in excess of those previously deemed just and reasonable. Sunoco, Inc. (R&M) (Sunoco) agrees. Indicated Shippers object to Transco transferring a portion of its integrated system, including facilities currently functionalized as transmission, to an unregulated affiliate. Indicated Shippers also dispute the contention that maintaining these facilities as transmission hinders Transco's ability to compete with exempt gatherers, pointing out that Transco may discount its rates to compete and that Transco has failed to identify any gatherer against which it cannot effectively compete. Indicated Shippers contend that if the systems remain regulated, Transco will not be able to collect rates in excess of its maximum tariff rates. Indicated Shippers further state that in the absence of competitive alternatives, the abandonment of the North Padre and Central Texas systems will allow WGP to wield substan

[15] The members of the Indicated Shippers include: Amerada Hess Corporation, Amoco Production Company and BP Energy Company, Anadarko Petroleum Corporation, Burlington Resources Oil & Gas Company, Chevron U.S.A. Inc., Conoco Inc., Exxon Mobil Corporation, OXY USA Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc. Each of the members has intervened separately.

tial market power permitting them to exact monopoly rents from shippers.

Sunoco restates many of these arguments, but complains that WGP appears to be planning to disavow Transco's existing contractual obligations and to force shippers to renegotiate long-term agreements that had been entered into at arm's length. Sunoco submits that such renegotiation is totally inappropriate where shippers, such as Sunoco, have existing long-term contracts. Sunoco believes that such renegotiation would adversely affects Sunoco's rights under the current contract, such as the fact that it currently receives FT feeder service, which it believes is essential for its operations, rather than IT feeder service. Sunoco requests that the spindown not be approved and suggests convening a technical conference to discuss these issues. However, Sunoco requests that, if the spindown is approved, the Commission should require Transco and WGP to provide written assurance that they will continue to honor Sunoco's contract with respect to all rights, terms and obligations, until the expiration of the contract.

Producer Coalition also suggests that the Commission should require Transco/WGP to disclose the proposed rates and conditions of future service on the North Padre and Central Texas facilities, prior to the issuance of a Commission order on the spindown. Producer Coalition disputes Transco/WGP's contention that WGP is negotiating with its customers and offering a package of services. It contends that WGP has failed to make any disclosure of the rates and terms and conditions it intends to offer. Without this advance information, Producer Coalition states, the shippers are left to assume the worst-that WGP, in fact, intends to exploit its market power.

Indicated Shippers also question the appropriateness of Transco abandoning seven source/receipt points, noting possible adverse impacts on certain interruptible shippers.

Indicated Shippers note that Transco claims that certain interruptible shippers will be affected by the abandonment, but that Transco fails to indicate that the reason that generally only IT shippers will be affected is that the facilities are part of Transco's IT-feeder system on which Transco offers FT service to only a few grandfathered shippers. Indicated Shippers submit that the abandonment will affect IT-feeder shippers whose gas feeds FT shippers at Transco's pools.

Superior/Walter offer similar arguments opposing the spindown. They allege that the proposal is nothing more than a vehicle to significantly increase the production area rates that marketers and producers must pay over the regulated IT feeder rates currently being charged. They also believe that the primary function of the facilities at issue remains transmission.

The KeySpan Delivery Companies request that the Commission not only approve the spindown of the North Padre and Central Texas facilities, but of all of the remaining production area facilities. They further request that the Commission require under section 5 of the NGA that Transco's rates be adjusted to reflect the removal of the related costs from Transco's jurisdictional rates. The Transco Municipal Group and the Municipal Gas Authority of Georgia (collectively Municipal Group) likewise request that Transco's rates be modified under either section 4 or section 5 of the Natural Gas Act to reflect the removal of the production area costs from the jurisdictional rates.

a. Transco and WGP Response

Transco/WGP argue that the proposed spindown is pro-competitive, in the public interest, and consistent with Commission policy. They contend that the proposed abandonment is an appropriate response to changed circumstances, since the facilities were constructed to support Transco's certificated sales, but Transco no longer provides a merchant

service and no longer needs the facilities. They believe that the Indicated Shippers' protest should be denied, because it is largely a collateral attack on the Commission's court-approved policy[16] favoring the spindown of gathering facilities, which Transco/WGP contend is consistent with the Commission's unbundling policies and other pro-competitive objectives. As to the issues of competitive factors and market power, Transco/WGP state that the Commission has found them irrelevant in determining the function of OCS facilities.[17] Transco/WGP find it disingenuous that some of the protestors consistently oppose spindowns by interstate pipelines, while at the same time some of them enjoy non-NGA regulated status for their own OCS gathering pipelines. In any event, Transco/WGP point to the fact that the protestors will be protected by the open access and nondiscrimination provisions of the OCSLA.

As to the contention that the spindown will result in a degradation of existing transportation service because seven receipt points will be deleted from certain of Transco's FT agreements, Transco/WGP state that WGP plans to negotiate post-spindown agreements with all shippers and it will operate the facilities in an open and nondiscrimina tory manner.

Transco/WGP agree with KeySpan that a comprehensive spindown of all Transco facilities that perform a gathering function is the preferable course.

As to the requests that the Commission require Transco to remove from its rates the cost of the facilities to be transferred, Transco states that if the Commission approves

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[16] Citing *Conoco Inc. v. FERC*, 90 F.3rd 536 (D.C. Cir. 1996), cert. denied, 519 U.S. 1142 (1997) (Conoco); *Pacific Gas and Electric Company v. FERC*, 106 F.3rd 1190 (5th Cir. 1997).

[17] Citing *Mid Louisiana Gas Company*, 67 FERC ¶ 61,255 at 61,851 (1994).

the spindown prior to the effective date of its next effective rate case, it will make a rate filing to reflect the spindown as approved.

b. Commission Response

Transco, like many interstate pipelines, found after restructuring its system consistent with Order No. 636, and moving from a bundled, merchant function to an unbundled, transportation function, that it no longer needed all of its existing system facilities. The Commission routinely grants requests to abandon facilities that we determine were used to gather gas supplies in support of the merchant gas sales function a pipeline no longer offers.[18] The fact that these facilities were previously certificated is not determinative of whether the present or future public convenience and necessity allow their abandonment. Further, the fact that a certificate exists for a given facility may not be determinative of its true jurisdictional status. As we stated in CNG, "until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined." [19] Here, we find it reasonable for Transco to abandon the portions of the systems it seeks to spindown to its gathering affiliate because those facilities are no longer necessary for the service it currently provides. We also find that our policies regarding the spindown of offshore facilities is clear, and that the record in this proceeding is adequate for us to determine the proper function of the facilities. Therefore, we deny the request for a technical conference.

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[18] *See Trunkline Gas Company*, 95 FERC ¶ 61,337 (2001); *Natural Gas Pipeline Company of America*, 94 FERC ¶ 61,186 (2001); and *Northern Natural Gas Company*, 93 FERC ¶ 61,101 (2000).

[19] *CNG Transmission Corporation*, 67 FERC ¶ 61,330 at 62,177 (1994) (CNG).

The protestors argue that existing shippers will be adversely affected by the spindown because there will be no competition and they will have to deal with an unregulated entity for the same service that they currently receive from Transco. However, the transfer of gathering facilities and services by interstate pipelines to nonjurisdictional entities is consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry.[20] As we have noted, section 1(b) of the NGA exempts gathering from the jurisdiction of this Commission. Thus, if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion to withhold such authorization. Here, consistent with the discussion below, we are finding that Transco's facilities perform a gathering function.

Nor is the issue of competition relevant to whether or not the Commission will regulate an affiliated gatherer's rates or terms and conditions of service after it acquires abandoned facilities. The Commission has no authority to regulate a gatherer's rates or its terms and conditions of service.[21] We find that the separate rate structure shippers will encounter after the spindown is consistent with the unbundling principles expressed in Order No. 636, where the Commission noted that shippers are expected to pay a separate rate for each separate service they receive. These shippers, in effect, have been on notice since February 21, 1996, when Transco filed its initial application in Docket No. CP96-206-000, that it desired to abandon, among others, the facilities at issue here. This interval of over five years has provided an extended transition period for these shippers to contemplate their

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[20] *See Northern Natural Gas Company*, 93 FERC ¶ 61,101 at 61,273 (2000).

[21] Conoco.

service options in the event the abandonment of these facilities was approved.[22]

In addition, the facilities at issue here are located on the OCS and will become subject to the OCSLA upon approval of the spindown. Under the OCSLA, WGP is prevented from discriminating against any shipper that seeks access to the facilities it will acquire in this proceeding from Transco. Assuming all existing shippers through the North Padre and Central Texas Systems want to continue moving their gas via the same path, both they and WGP will have a vested interest in reaching mutually agreed upon terms and conditions for continuation of the existing service. Since the OCSLA guarantees shippers open and nondiscriminatory access to offshore facilities, WGP cannot discriminate between shippers and has incentive (full facilities) to negotiate fairly with Transco's existing shippers. In Transco/WGP's answer, WGP states that it intends to negotiate post-spindown agreements with all shippers and that the spindown should not result in degraded service. Since we will continue to employ our NGA authority to ensure that Transco's jurisdictional rates remain just and reasonable, WGP's commitment, along with the protections provided by the OCSLA, will act to ensure adequate access and service to existing customers. We note that section 330.2 of our OCSLA regulations require that WGP report the terms under which it provides service to its shippers.[23] In the event that any shipper believes that either

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[22] *See NorAm Gas Transmission Co.*, 78 FERC ¶ 61,265, at 62,128 (1997). We previously conditioned the spindown or spinoff of gathering facilities on the acquiring entity's continuing to provide comparable service to existing shippers for a two-year term. This two-year time was intended to serve as a transitional period, during which shippers subject to NGA-regulated transportation service agreements could consider their options as NGA-exempt gathering customers. In Conoco, however, the court ruled that the Commission lacked jurisdiction to impose this particular condition on abandonments.

[23] 18 CFR § 332.2 (2000).

Transco or WGP have violated its statutory requirements under the OCSLA, or that the terms of service WGP offers any existing shipper prove inconsistent with the OCSLA's requirements, the shipper can file a complaint and the Commission will investigate any such complaint in a timely manner.[24] Further, Transco already has in its tariff standards of conduct for gathering affiliates that prevent it from acting in a discriminatory manner by guarding against the risk of affiliate abuse and ensuring an arm's length relationship between it and WGP.[25]

As to the requests of KeySpan and the Municipal Group, we will require Transco, consistent with section 154.303 (c)(2) of our regulations,[26] to remove the cost of the facilities abandoned and transferred here from the rates it proposes to charge in its current rate proceeding in Docket No. RP01-245-000.

2. Changed Position on Facilities

Indicated Shippers complain that Transco has previously argued that its offshore and onshore facilities were transmission facilities because they constitute a unitary, interdependent and integrated pipeline system that has always been regulated. Indicated Shippers contend that Transco has not justified its change in functionalization of the facilities from transmission to gathering. The Producer Coalition and Superior/Walter argue similarly.

a. Transco/WGP Response

Transco/WGP contend that the factors these protestors rely on (prior certificate and rate status, integrated nature of facilities, ownership by an interstate pipeline, reliance on past

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[24] 18 CFR § 385.206 (2000).

[25] *See* Third Revised Sheet No. 350, Third Revised Volume No. 1 to Transco's FERC Gas Tariff.

[26] 18 CFR § 154.303 (c)(2) (2000).

regulation, and the presence or absence of competition) are of little or no relevance to the jurisdictional status of the facilities.

b. Commission Response

We find no cause to disallow Transco the right to claim its facilities perform a gathering function, when in the past it may have advocated the facilities function as transmission. As noted above, the Commission has consistently found that a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the facilities for purposes of jurisdiction under section 1(b) of the NGA. How pipelines historically functionalized their facilities for rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities.[27] Here, we are finding that portions of the Central Texas and North Padre Systems do, in fact, perform a gathering function and are therefore exempt from our jurisdiction under section 1(b) of the NGA. However, as we stated above, those facilities will remain subject to the OCSLA's requirements for open and nondiscriminatory access for all shippers.

3. Joint Ownership of Facilities

Tennessee Gas Pipeline Company (Tennessee), a partial owner of the Central Texas System, protests the proposal with regard to proposed service over the facilities. Tennessee also states that it has been unable to obtain a specific condition prohibiting discriminatory conduct by WGP or its affiliates and it asserts a right of first refusal (ROFR) to purchase Transco's interest in the facilities. Tennessee states that

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[27] *See Southern Natural Gas Company, et. al.*, 79 FERC ¶ 61,076 at 61,379 (1997).

Transco, Tennessee and three other natural gas pipelines[28] jointly own the Project Central Texas Loop, which comprises a part of the Central Texas System. According to Tennessee, each of the interest owners possess a ROFR under the joint Construction and Ownership Agreement to purchase Transco's interest in the Project Central Texas Loop.

Tennessee states that it has attempted to obtain assurances from Transco and WGP's corporate parent, William Field Services Group, Inc. (WFS) that the interests of its shippers would not be adversely affected by the proposed transfer of facilities. Despite such assurances by Transco and WGP, Tennessee contends that WFS has refused to agree to such assurances in connection with WGP's intentions to offer service over its interest in the facilities.

Tennessee states that only Transco and Tennessee own mainline facilities that are contiguous to the Project Central Texas Loop. Tennessee is concerned that if Transco's interest in the Project Central Texas Loop is transferred to WGP, affiliates of the Williams Companies will be the largest owner of the facilities, will be the operator of the facilities, and will own one of two pipelines with transmission mainline contiguous to the facilities. Tennessee believes that absent a specific condition prohibiting undue discrimination, WGP will have both the incentive and the opportunity to structure the non-jurisdictional services that it provides over these facilities in a manner that benefits its affiliates and disadvantages Tennessee. In addition, Tennessee argues that the Commission should not authorize Transco to spindown these facilities without first obtaining from Transco and WGP waivers of the ROFR from all the joint owners of the facilities, and requiring WFS/WGP to commit to the

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[28] The other owners are Columbia Gulf Transmission Company (Columbia Gulf), ANR Pipeline Company and Northern Natural Gas Company.

standards of conduct regarding gathering affiliates found in Transco's tariff.

a. Transco's and WGP's Response

Transco/WGP responded stating that neither of the issues raised provides a valid reason to delay or condition the spindown. Transco states that Tennessee is already protected from discriminatory conduct by affiliates by both Transco's tariff [29] and the OCSLA, which mandates that all pipelines on the OCS "provide open and nondiscriminatory access to both owner and nonowner shippers." [30] Transco states that WGP is an OCS pipeline operator and obligated to comply with provisions of the OCSLA. Further, Transco argues that the Commission does not have jurisdiction over non-pipeline gatherers, and thus cannot impose conditions on WGP or WFS.

Transco also states that Tennessee's assertion of a ROFR to purchase a portion of the facilities should not delay the proceeding. Transco contends that it will address any potential issues concerning ROFR and will take any appropriate action in accordance with its contract prior to transfer of the facilities. Transco states that its agreement with WGP provides that the parties will obtain any necessary third party approvals or waivers prior to transfer of the facilities.

b. Commission Response

We find that Tennessee's concern regarding a ROFR to purchase a portion of the Central Texas System is not germane to the abandonment issue before us. We have determined that Transco no longer needs the facilities to perform its jurisdictional transportation service. More

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[29] *See* note 24.

[30] Transco cites *Northern Natural Gas Company*, 93 FERC ¶ 61,101 at 61,274 (2000), which states "[T]he OCSLA guarantees shippers open and nondiscriminatory access to offshore facilities."

importantly, we are finding concurrently that the facilities will perform a nonjurisdictional gathering function. Tennessee raises an issue regarding the status of a private contractual arrangement that is not before the Commission.

As we stated above, both WGP and the existing shippers have legitimate reasons to negotiate fair successor service to that provided by Transco. In addition, Transco is prohibited by its tariff from giving preferential treatment to its gathering affiliates, or tying any of its services to services provided by its gathering affiliates. Thus, we can oversee Transco's dealings with WGP and can enforce the standards of conduct regarding gathering affiliates in Transco's tariff. However, we cannot require WGP to abide by Transco's tariff provisions, simply because we lack jurisdiction over WGP. However, WGP will be bound by the open-access, nondiscriminatory provisions of the OCSLA, which, in concert with our continued regulation of Transco's rates and terms and conditions of service and our complaint procedures, will serve to provide shippers with adequate protection after the spindown.

C. Jurisdictional Status of Facilities

WGP asks us to declare that these facilities would be nonjurisdictional gathering facilities if operated as described in its petition.[31]

Under NGA section 1(b), the Commission has jurisdiction to regulate the transportation and sale for resale of natural gas in interstate commerce and any natural gas company engaged in that transportation or sale. Section 1(b) states, however, that the Commission's jurisdiction does not extend

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[31] Transco's proposed spindown is being undertaken at the same time as Transco seeks in Docket No. RP92-137-050 to implement a two-part, production area, straight fixed variable rate proposal, and firm-to-gathering rate design. The Commission addressed these issues in its May 31, 2001 order in that proceeding, 95 FERC ¶ 61,322 (2001).

to facilities used for the production or gathering of natural gas. To determine whether particular facilities perform primarily a gathering or transmission function, the Commission considers the criteria articulated in Farmland Industries, Inc., (Farmland)[32] as modified by Amerada Hess Corporation (Amerada Hess)[33] and Sea Robin.

In Farmland, the Commission enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the location of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures of the facility.[34] The Commission does not consider any single factor to be determinative and recognizes that all factors do not necessarily apply in all situations.

Over the past decade, the Commission found it necessary to modify the primary function test to recognize the unique physical characteristics of offshore pipeline facilities built on the OCS. In Amerada Hess, the Commission acknowledged that technological advances make it possible to drill for gas at increasing offshore depths. Thus, following Amerada Hess, the Commission has applied a "sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the

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[32] 23 FERC ¶ 61,063 (1983).

[33] 52 FERC ¶ 61,268 (1990).

[34] In addition to the Farmland factors, the Commission considers these non-physical criteria in its jurisdictional analysis: (1) the purpose, location, and operation of the facility, (2) the general business activity of the owner of the facility, and (3) whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act.

water depth of the offshore production area."[35] This "modified primary function" test recognizes that a relatively long pipeline on the OCS may be consistent with a primary function of gathering or production where onshore it would not.

In order to further clarify the jurisdictional status of offshore facilities, the Commission issued an OCS Policy Statement[36] which added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more. The Policy Statement creates a presumption that these deep water facilities are gathering facilities up to the point or points of interconnection with the interstate pipeline grid. Aside from this presumption concerning deep water facilities, the Policy Statement left the application of the primary function test unchanged.

More recently, as a result of the court's opinion in Sea Robin, the Commission has reconsidered the primary function test in view of the unique challenges presented in the attempt to apply Farmland factors to offshore facilities. Sea Robin vacated and remanded Commission orders that found under the primary function test, that Sea Robin's OCS pipeline facilities were jurisdictional transmission facilities. In its primary function analysis the Commission excluded most of the Farmland factors because they were difficult or impossible to apply to the distinct activity of retrieving gas from the OCS. Thus, the only physical factor considered by the Commission was the size and length of Sea Robin's pipeline. The Commission also gave weight to non-physical

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[35] *Id.* at 61,988.

[36] Gas Pipeline Facilities and Services on the Outer Continental Shelf-Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 (1996), order dismissing reh'g, 75 FERC ¶ 61,291 (1996).

criteria such as business purpose, ownership and prior certification of the facilities.

The Sea Robin court found, among other things, that the Commission's focus primarily on the length and diameter of the overall system was not reasoned consideration. Further, the court acknowledged that non-physical considerations are relevant in the analysis but that they are secondary to physical considerations which must be used in determining where gathering ends and transportation begins.

On remand, the court allowed the Commission to reformulate its primary function test—to replace those physical and operational criteria that are not relevant to the characteristics of OCS pipelines with other criteria that are. The court also allowed that the Commission could consider suggestions made by Sea Robin that portions of its system were predominantly involved in gathering while other portions were transmission.

In the order on remand in Sea Robin, the Commission took the court's suggested approach and reconsidered the application of the primary function test to the OCS facilities and concluded that the "behind-the-plant" factor was not necessarily determinative when the primary function test is applied to offshore facilities. Rather, the Commission decided to assess the physical configuration of a pipeline system to determine if there is a central location where gas is aggregated for further transportation to shore. The Commission concluded that it would view such a location as being the offshore equivalent of the onshore "central-point-in-the-field" factor of the primary function test.

In sum, the reformulated primary function test (1) adopts an additional analytical element applicable to systems that contain a centralized aggregation point, (2) adjusts the weight afforded to the "behind-the-plant" criterion so that the location of the processing plants is not necessarily determi-

native and can be outweighed by other factors, and (3) focuses primarily on physical factors. After applying the reformulated primary function test to Sea Robin's system, the Commission determined that gathering on Sea Robin ends at an internal point on the pipeline's certificated system—that point being Sea Robin's Vermillion Block 149 Compression Station where gas from numerous production platforms is aggregated—and that transportation occurs over the remaining and longest part of its system which consists of a straight, large diameter trunkline that delivers gas to onshore processing plants.

1. Protests

Indicated Shippers protests WGP's declaratory order pointing out that in the OCS Policy Statement, the Commission rejected calls by Transco and other companies that all OCS facilities be found to be gathering. It argues that the Policy Statement provides that new facilities located in water depths of 200 meters or more will be presumed to be gathering, but that the Commission would not withdraw its jurisdiction, absent changed circumstances, for existing facilities in shallower waters. Indicated Shippers submits that the facilities at issue are located in waters shallower than 200 meters and that Transco has not demonstrated that the primary function of the facilities has changed. Sunoco contends similarly and states that the overwhelming majority of the facilities subject to the spindown are not characteristic of gathering facilities. Likewise, Superior/Walter argue that Transco has not shown that the facilities are, in fact, gathering rather than transmission.

Indicated Shippers and Sunoco also dispute Transco's reliance on Sea Robin as the primary support for their request to refunctionalize the South Padre and Central Texas facilities. In particular, they object to the new "central aggregation point" test added to the OCS criteria and point out that certain parties have sought court review of the Sea

Robin orders setting forth the new test. Indicated Shippers also note that numerous wells to be attached to the two systems are located some distance from any of the Transco facilities. They submit that the gathering function is applicable to these facilities, not the Transco facilities at issue. Indicated Shippers also note that a number of the facilities at issue are jointly owned with other pipelines, and request that the Commission investigate whether, from the perspective of the operations and activities of the other owners, the facilities should remain transmission.

Indicated Shippers also submits that a central factor in determining the primary function of the facilities at issue is the overall business purpose of the system. They submit that the OCS transmission facilities are part of Transco's integrated pipeline system.

Producer Coalition, another ad hoc group of natural gas producers, who market gas on Transco's system[37] primarily objects to the services using the facilities no longer being subject to rate caps if the Commission determines the facilities to be gathering. Producer Coalition suggests that the Commission take no action on the spindown until after the United States Court of Appeals for the D.C. Circuit decides the Sea Robin case. Like Indicated Shippers, Producer Coalition submits that, rather than the reformulated modified primary function test announced in Sea Robin, the Commission should adopt the "feeder line test" described in the legislative history to Section 5(f)(2) of the Outer Continental Shelf Lands Act (OCSLA). Under the feeder line test, gathering extends from the wellhead to the point where the gas is first collected and treated to remove free water in

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[37] This group consists of Dominion Exploration & Production, Inc., Devon Energy Corporation, Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, Ocean Energy, Inc., and TotalFinaElf E&P U.S.A., Inc. Ocean Energy, Inc. has already intervened in this case.

preparation for injection into a pipeline for transportation to shore. They believe that since the facilities listed in the application and petition appear to be downstream of the platform separators and treating facilities, they are not gathering facilities.

Producer Coalition also believes that, even if the Commission's Sea Robin order is sustained, the Transco facilities are not used for a gathering function. It notes that Transco and WGP rely on the Commission's central point of aggregation test. However, it states that the Commission determined in later orders that the primary function of offshore facilities was not reduced to simply identifying the first fork or interconnection in a line leading from shore.[38] It stresses the integrated nature of Transco's system and indicates that the Commission takes the aggregation point on a system into account along with other factors of the primary function test.

a. Transco/WGP Response

Transco/WGP contend that the Indicated Shippers' functional analysis of the facilities unduly relies on non-physical factors, such as prior certificate and rate classification, system integration, and effects on competition, ownership and business purpose, which the courts have repeatedly held are of little or no relevance to the jurisdictional status of facilities under section 1(b) of the NGA. Transco/WGP also point out that, even in the absence of continued NGA regulation of these facilities, Indicated Shippers still will be protected by the open access and nondiscrimination provisions of the OCSLA.

Contrary to Indicated Shippers' contention that the Sea Robin decision is too broad an interpretation of the NGA

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[38] *See Dauphin Island Gathering System*, 93 FERC ¶ 61,198 at 61,654 (2000).

section 1(b) exemption. WGP states that it showed in that case that the Commission's reformulated primary function test results in too limited a view of the exemption. Transco/WGP state that they relied on Sea Robin to guide the scope of the instant spindown, while reserving their right to challenge any findings in appropriate proceedings. Transco/WGP submit that Sea Robin provides compelling support for non-jurisdictional status for the subject spindown, in that the geographical configuration (inverted Y) of the Sea Robin system bears a striking resemblance to the configuration of the Central Texas System. That is, the upstream legs of the Sea Robin system are configured similar to the upstream legs of the Central Texas System.

Transco/WGP oppose the Producer Coalitions' request to delay the processing of the spindown until after the D.C. Circuit acts on the Sea Robin appeal. Transco/WGP complain that, because of previous delays in processing its spindown proceedings, they have already been placed at an unfair disadvantage, vis-a-vis other competitors for OCS gathering services. Transco/WGP also reject Producer Coalition's request for the Commission to adopt a limited interpretation of gathering that they claim would result in the Commission's exercise of NGA jurisdiction over virtually all OCS pipelines (all lines downstream of initial platform separators). Transco/WGP contend that the "feeder line" test was specifically rejected by the Commission as legally deficient in Sea Robin.[39] Transco/WGP state that other attempts to unduly limit the section 1(b) gathering function have been struck down by various courts of appeal.

Transco/WGP also object to the Producer Coalition's request to require the disclosure of post-spindown rates and terms and conditions to be offered to shippers. They submit that the Commission has no authority to regulate the post-

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[39] 92 FERC at 61,294.

spindown rates and terms and conditions offered by gathering companies, even those affiliated with a jurisdictional gathering company. Also, they indicate that the Commission has recognized that the OCSLA does not authorize NGA-type rate regulation of OCS pipeline companies.[40]

Transco/WGP also dismiss as inaccurate the contention that, because the Central Texas facilities are jointly owned by Transco, Tennessee, and Columbia Gulf, and that because Tennessee and Columbia Gulf are fully booked, WGP will be able to raise rates when the facilities are spun down. Transco/WGP state that the Central Texas facilities are substantially underutilized, with one-half to two thirds of the capacity unused, and that the owners have marketed substantial portions of the capacity at discounted rates. Also, Transco/WGP reiterate that allegations about competition for gathering services are irrelevant to the jurisdictional status of the facilities.

b. Commission Response

We conclude, for the reasons discussed below, that an assessment of the primary function factors, as modified with respect to offshore facilities, demonstrates that both the North Padre and Central Texas facilities at issue here are performing primarily a gathering function and will continue to be used in this capacity following their abandonment by sale to WGP. Accordingly, we find the North Padre and Central Texas facilities to be exempt from our NGA regulatory oversight.

The North Padre facilities consist of 3.83 miles of 10- inch and 18.79 miles of 20-inch diameter pipeline, which are relatively small and short compared to some of the facilities found to be gathering in Sea Robin. The 10-inch line is

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[40] Order No. 639-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,103, at 31,686 (2000).

common for gathering facilities, and even the 20-inch line does not necessarily denote a transmission function. More importantly, the length and diameter of both lines reflects the large volume of gas, approximately 100 MMcf per day, that is collected from numerous wells in the offshore production area in which the facilities are located. While the wells may not be directly connected to either lateral, that does not disqualify the lines from a finding of gathering. It merely reflects the nature of offshore production, where gas from numerous wells is aggregated at production platforms for movement onshore.

The North Padre system is configured in the shape of an inverted "Y" with two relatively short legs branching out from a central point, which connects to the main transmission trunk. These legs, as noted, serve to collect gas from the surrounding production areas. This configuration is consistent with a gathering function.

There is no compression located along the North Padre facilities, which means that the system operating pressures of between 750 and 900 psig are a function of the wellhead pressures. The wellhead pressures act to push the gas through the facilities, which is typical of a gathering function,[41] unlike compression, which is typical of a transmission function. The operating pressures are consistent with those of other offshore facilities found to be gathering.[42]

In addition, there are no processing plants located on or connected to the North Padre facilities. We have previously discussed the impracticality of locating processing plants offshore[43] and concluded that, in the offshore context, the

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[41] *See Tarpon Transmission Company*, 78 FERC ¶ 61,025 (1992).

[42] *See Trunkline Gas Company*, 95 FERC ¶ 61,337 (2001).

[43] *See, e.g., EP Operating v. FERC*, 876 F.2d 45, 49 (5th Cir. 1989).

absence of processing plants is of little value in assessing the primary function of facilities.

In Sea Robin, we stated that for offshore systems, in addition to the other Farmland factors, we would consider whether the system contained a centralized aggregation point.[44] The North Padre facilities exhibit characteristics of such an aggregation point. We believe that the central aggregation point is located in North Padre Island Block 956, where the 10-inch and 20-inch legs, which gather the gas, converge to form a single 24- inch line that transports the gathered gas onshore to Transco's mainline. In Sea Robin, we found the central point of aggregation exemplified a "marked change in the physical attributes and geographic configuration."[45] Although the North Padre Island Block 956 point does not exhibit as strong an indication of a marked change as was the case in Sea Robin, we nevertheless find it functions as an aggregation point that may be interpreted as indicating a demarcation of gathering and transmission functions.

The Central Texas System consists of approximately 270 miles of 6-inch to 30-inch offshore lateral facilities that feed into a central point of aggregation located at Brazos Area Block 538, which is connected to a set of 30-inch and 36-inch trunk lines for transportation onshore. These facilities include two small, noncontiguous stub lines, which feed directly into the trunklines downstream of the aggregation point. Over 76 percent of these facilities are 20-inches or less in diameter. The lines range in length, with the shortest being slightly

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[44] Since offshore gas may be collected from numerous wells throughout a producing field, and then brought to a production platform, the location of such platform is not a reliable indicator of the central point in the field. In Sea Robin, we found it appropriate to employ the centralized point of aggregation for offshore systems as an analog for the central point in the field for onshore systems.

[45] 87 FERC ¶ 61,384, at 62,430 (1999), order denying reh'g, 92 FERC ¶ 61,072 (2000).

more than one- tenth of a mile, and the largest being a 30 mile long, 30-inch in diameter line. The size and scope of these facilities is consistent with those found to be gathering in Sea Robin. Even the 30-inch line does not necessarily denote a transmission function. The length and diameter of the lines reflects the large volume of gas, approximately 400 MMcf per day, that is collected from numerous wells attached to various production platforms and 73 receipt points in the offshore production area in which the facilities are located. This reflects a gathering rather than transmission function. In this instance, the absence of direct well tie-ins to the Central Texas facilities does not point to a transmission function. In the context of offshore facilities, the Commission has found that a lack of well connections along the length of facilities is attributable to the nature of offshore drilling, where, as noted above, gas from numerous wells is aggregated on individual platforms for delivery onshore.[46]

The configuration of the Central Texas facilities closely resemble that of an inverted "Y" with the legs branching out from the Brazos Area Block 538 central aggregation point. The numerous legs in this configuration extend out into the surrounding production areas and serve to gather gas for movement to the central aggregation point. This is consistent with a finding of gathering. In addition, the fact that the two small stub lines are located downstream from the central aggregation point does not detract from their primary function of gathering. Like the upstream legs, these lines also serve to gather gas from production located in their vicinity.

As with the North Padre facilities, there is no compression located along the Central Texas facilities. None is necessary since the system operating pressures of between 725 and 1,200 psig are a function of the natural wellhead delivery pressures and serve to move the gas onshore. While these

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[46] 67 FERC ¶ 61,256 at 61,859 (1994).

pressures would indicate a transportation function onshore, they are not dispositive in the offshore context. These pressures are consistent with the nature of offshore production and are also indicative of a gathering function, not a transmission function.[47]

There are also no processing plants located on or connected to the Central Texas facilities. Again, we have previously discussed the impracticality of locating processing plants offshore[48] and concluded that, in the offshore context, the absence of processing plants is of little value in assessing the primary function of facilities.

As stated above, we treat offshore systems in a different manner than onshore systems. For offshore systems, in addition to the other Farmland factors, we consider whether the system contains a centralized aggregation point. Such a point would be analogous to an onshore system exhibiting a central point in the field. The Central Texas facilities have such an aggregation point at Brazos Area Block 538, where the 6 to 30-inch lines converge on a platform that contains valve manifolds and mechanical pig launchers and receivers. At the platform, the upstream lines feed into the main 30-inch and 36-inch trunklines that move the gas onshore. While there are interconnects with two relatively small Transco laterals downstream of the platform, the gas introduced from them is dwarfed by gas volumes collected at and upstream of the Block 538 platform. In Sea Robin, we found the central point of aggregation on Sea Robin's system exemplified a "marked change in the physical attributes and geographic configuration." We find that the Brazos Area Block 538 platform is similar to the point in Sea Robin, and functions as an aggregation point that may be interpreted as indicating a demarcation of gathering and transmission functions. The

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[47] *See* note 41.

[48] *See, e.g., EP Operating v. FERC*, 876 F.2d 45, 49 (5th Cir. 1989).

collection or gathering of gas occurs primarily upstream of the platform, while transportation occurs through the looped trunklines downstream from that point.

Protestors want the Commission to delay action here pending the outcome of the court proceedings in Sea Robin and suggest that we adopt the "feeder line test" rather than the primary function test to determine gathering. First, we will not hold this proceeding in abeyance pending the outcome of the Sea Robin court case. The Commission currently has guidance from the court on how to proceed in distinguishing gathering from transmission on the OCS and we use that guidance in our determination here. Second, we have already addressed the "feeder line" issue in our order on Sea Robin. There, the Commission rejected arguments that, as a result of enactment of the OCSLA, we must adopt a "feeder line" definition of gathering. For the same reasons, we reach the same conclusion here.[49]

Indicated Shippers argue that our OCS Policy Statement established the expectation that, absent changed circumstances, existing offshore facilities are to retain their jurisdictional or nonjurisdictional status under the NGA. We disagree. The OCS Policy Statement is not intended to stand for permanently fixing the present jurisdictional status of offshore facilities. The OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. We find Transco's restructuring and the adaptation of our primary function test in the Sea Robin order on remand qualify as legitimate reasons to revisit the jurisdictional status of Transco's existing offshore facilities.

Indicated Shippers contends that a central factor in determining the primary function of the facilities at issue is the overall business purpose of the system. While we find it useful to look at the nature of the company that owns and

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[49] *See* 92 FERC ¶ 61,072 at 61,294 (2000).

operates facilities proposed to be spundown, that is but one of the factors to be considered. Here, Transco is an interstate gas transporter that has gone through restructuring to segregate its previously bundled services. We find that Transco's primary business is that of transportation. However, we also find that the nature of Transco's business, in and of itself, does not disqualify the facilities at issue from a determination of gathering. The Commission, in its primary function analysis, does not consider any one factor to be determinative and recognizes that all factors do not necessarily apply in all situations. It is the nature of Transco's business that drives it to spindown the gathering facilities at issue here.

While not all factors of our primary function test point to an identical outcome, we nonetheless find that, on balance, the North Padre and Central Texas facilities function primarily as gathering facilities and are exempt from our jurisdiction under section 1(b) of the NGA. Since WGP is currently an NGA-exempt gatherer, we declare that subsequent to the sale to WGP, the North Padre and Central Texas facilities will operate as NGA- exempt gathering facilities. Accordingly, we will approve Transco's request to abandon the facilities by sale to WGP.

ANR, Northern, Columbia Gulf, and Tennessee, co-own with Transco some of the subject facilities we have found to be nonjurisdictional. To the extent that these co-owners currently functionalize their interests in the facilities as transmission, they will need to refunctionalize their facilities as gathering for rate and accounting purposes in their next NGA section 4 rate proceedings.[50]

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[50] *See CNG Transmission Corp.*, 67 FERC ¶ 61,330, at 62,178 (1994); *Southern Natural Gas Company*, 79 FERC ¶ 61,076 at 61,380 (1997); and *Natural Gas Pipeline Company of America*, 95 FERC ¶ 61,317 (2001).

C. Environmental

Finally, we conclude that approval of the proposed abandonment will not constitute a major federal action significantly affecting the quality of the environment.

At a hearing held on July 25, 2001, the Commission on its own motion received and made a part of the record in these proceedings all evidence submitted, including the applications and petitions and exhibits supporting the sought authorizations, and after consideration of the record,

The Commission orders:

(A) In Docket No. CP01-34-000, Transco is granted permission and approval under NGA section 7(b) to abandon by sale to WGP, its interests in the North Padre and Central Texas facilities described in its application and in this order.

(B) In Docket No. CP01-32-000, the Commission declares that upon acquisition by WGP, the facilities to be abandoned will be deemed gathering facilities exempt from the Commission's jurisdiction under NGA section 1(b).

(C) Transco shall notify the Commission within 10 days of the date of abandonment of the facilities described above.

(D) Transco is authorized to abandon its Rate Schedule X-66 transportation service to Texas Eastern Transmission Corporation, as well as the affected receipt points under its part 284 agreements with Sun Company, Inc. and Texaco Refining and Marketing, Inc.

(E) Consistent with section 154.303(c)(2) of our regulations, Transco is directed to adjust its rates to remove the cost of the North Padre and Central Texas facilities in its current rate proceeding in Docket No. RP01-245-000.

(F) The protests in this proceeding are denied.

By the Commission.
[SEAL]
David P. Boergers
Secretary.

APPENDIX

Interventions and Protests in Docket No. CP01-32-000

Amerada Hess Corporation
Amoco Production Company and BP Energy Company
Anadarko Petroleum Corporation
Atlanta Gas Light Company and Virginia Natural Gas Company
Burlington Resources Oil & Gas Company
Chevron U.S.A. Inc.
Columbia Gulf Transmission Company
Enron North America Corp.
Enterprise Oil Gulf of Mexico Inc.
Exxon Mobil Corporation
Indicated Shippers
Kerr-McGee Oil & Gas Corporation
KeySpan Delivery Companies
Ocean Energy, Inc.
Pan Canadian Energy Services Inc.
Piedmont Natural Gas Company, Inc.
Process Gas Consumers Group
Producer Coalition
Public Service Commission of the State of New York
Shell Offshore Inc.
Sunoco Inc.
Superior Natural Gas Corporation and Walter Oil & Gas Corporation
Tennessee Gas Pipeline Company
Texaco Natural Gas Inc.
Transco Municipal Group and the Municipal Gas Authority of Georgia
Transcontinental Gas Pipe Line Corporation
United Cities Gas Company, a division of Atmos Energy Corporation

Interventions and Protests in Docket No. CP01-34-000

Amerada Hess Corporation
Amoco Production Company and BP Energy Company
Anadarko Petroleum Corporation
Atlanta Gas Light Company and Virginia Natural Gas Company
Baltimore Gas and Electric
Burlington Resources Oil & Gas Company L.P.
Chevron U.S.A. Inc.
Columbia Gulf Transmission Company
Conoco Inc.
Consolidated Edison Company of New York
Delmarva Power & Light Company
Enron North America Corp.
Enterprise Oil Gulf of Mexico Inc.
Exxon Mobil Corporation
Indicated Shippers
Kerr-McGee Oil & Gas Corporation
KeySpan Delivery Companies
Motiva Enterprises LLC
Ocean Energy, Inc.
Pan Canadian Energy Services Inc.
PECO Energy Company
Phillips Petroleum Company and Phillips Gas Marketing Company
Piedmont Natural Gas Company, Inc.
Process Gas Consumers Group
Producer Coalition
Public Service Commission of the State of New York
Public Service Electric and Gas Company
Shell Offshore Inc.
Sunoco Inc.
Superior Natural Gas Corporation and Walter Oil & Gas Corporation
Tennessee Gas Pipeline Company
Texaco Natural Gas Inc.

Transco Municipal Group and the Municipal Gas Authority of Georgia

United Cities Gas Company, a division of Atmos Energy Corporation

Washington Gas Light Company

Williams Gas Processing-Gulf Coast Company, L.P.

APPENDIX G

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

[Filed December 19, 2001]

Docket No. CP01-34-002
Docket No. CP01-32-001

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing-Gulf Coast Company, L.P.

ORDER ON REHEARING

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

On August 20, 2001, Transcontinental Gas Pipe Line Corporation (Transco) filed a Request for Rehearing and Limited Stay of the Commission's Order Authorizing Abandonment and Determining Jurisdictional Status of Facilities issued in these dockets on July 25, 2001 (July 25 Order).[1] On August 24, 2001, the Producer Coalition[2] and Indicated Shippers[3] also filed Requests for Rehearing of the

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[1] Transcontinental Gas Pipe Line Corporation, et al., 96 FERC ¶ 61, 115 (2001) (July 25 Order).

[2] The Producer Coalition is an ad hoc group of natural gas producers, made up of Devon Energy Corporation, Dominion Exploration & Production, Inc. Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, and Ocean Energy, Inc. These companies have significant investment in oil and gas exploration and production projects in the Gulf of Mexico and are shippers and marketers of gas on numerous OCS pipelines.

[3] Indicated Shippers is an ad hoc group of companies having an interest in gas transported on the Transco system. In this case, the members of Indicated Shippers are: Amerada Hess Corporation, Amoco Production

July 25 Order. On September 10, 2001, Key Span Delivery Companies, Atlanta Gas Light Company and Virginia Natural Gas Company, Consolidated Edison Company of New York, Inc., Delmarva Power & Light Company, Philadelphia Gas Works, Public Service Electric and Gas Company and Washington Gas Light Company (KeySpan, et al.) submitted a response in partial opposition to Transco's requests for rehearing and limited stay.[4]

The July 25 Order approved a request by Transco to abandon facilities comprising portions of the North Padre Island Gathering System (North Padre System) and the Central Texas Gathering System (Central Texas System) located offshore Texas by transfer to its gathering affiliate, Williams Gas Processing- Gulf Coast Company, L.P. (WGP). The July 25 Order also granted WGP's request that the Commission declare that the facilities it proposes to acquire from Transco will be, upon abandonment by transfer to WGP, gathering facilities and services, exempt from the Commission's jurisdiction under the NGA.[5] The July 25 Order also directed Transco to adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000. This order denies or grants the requests for rehearing, as discussed below.[6] As noted in the

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Company, BP Energy Company, Burlington Resources Oil & Gas Company, L.P., Chevron U.S.A., Inc., Exxon Mobil Corporation, Occidental Energy Marketing, Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc.

[4] Under the Commission's Rules of Practice and Procedure, there is nothing which forecloses KeySpan, et al. from responding to a request for stay. Under Rule 713(d) of those Rules, parties are normally precluded from responding to a request for rehearing. 18 CFR § 713(d). However, the Commission has determined that for good cause shown it will accept answers to rehearing.

[5] July 25 Order at 61,442, Ordering paragraph (B).

[6] As the Commission is granting the request for rehearing on the rate issue which is the subject of the motion for stay, the motion is moot.

July 25 Order, abandonment serves the public interest by permitting Transco to eliminate unnecessary facilities no longer needed to provide certificated services consistent with the unbundling policies of Order No. 636.[7] Granting rehearing on the rate issue serves the public interest by assuring that the jurisdictional rates will continue to reflect the cost of facilities used to provide jurisdictional service while also preserving the integrity of the Commission's ratemaking policies.

I. Background

The July 25 Order permitted Transco to abandon, by transfer to its affiliate WGB, portions of its North Padre System and Central Texas System located offshore Texas. The facilities to be abandoned from the North Padre System consist of 3.83 miles of 10-inch pipeline and 18.79 miles of 20-inch pipeline located in the North Padre Island Area and the North Padre Island Area East Addition. The facilities to be abandoned from the Central Texas system consist of approximately 271 miles of pipeline of 6-inch to 30-inch diameter located in the Galveston Area, Brazos Area, Brazos Area South Addition, Matagorda Island Area and Mustang Island Area East Addition. In response to WGP's request, the July 25 Order sought to determine whether the facilities at issue were used primarily to transport gas, and thereby were subject to the Commission's jurisdiction under the NGA, or were used primarily to produce or gather gas, and thereby were exempt from the Commission's NGA jurisdiction.[8]

To determine the primary function of particular facilities, the Commission applies the criteria articulated in Farmland Industries, Inc., (Farmland).[9] In Farmland, the Commission

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[7] 96 FERC at 61,434-5.

[8] Section 1(b) of the NGA states that "[t]he provisions of this Act . . . shall not apply to . . . the production or gathering of natural gas."

[9] 23 FERC ¶ 61,063 (1983).

enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the placement of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures. In addition to these physical and geographic criteria, the Commission also considers the purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act. We do not consider any single factor to be determinative and recognize that all factors do not necessarily apply in all situations.

The Commission has modified this primary function test for facilities located offshore. In 1990, in Amerada Hess Corporation (Amerada Hess),[10] the Commission observed that as a result of "recent advances in engineering and available technology, offshore drilling operations continue to move further offshore and further from existing interstate pipeline interconnections."[11] Given the increasingly remote location of such offshore facilities, the Commission found that offshore pipelines used to produce or gather gas may be larger and longer than onshore pipelines that perform the same function. Accordingly, the primary function test was modified for application to offshore facilities, by applying "a sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters."[12]

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[10] 52 FERC ¶ 61,268 (1990).

[11] *Id.*, at 61,988.

[12] *Id.*

In Sea Robin Pipeline Company (Sea Robin),[13] the Commission reformulated the primary function test with respect to offshore facilities by (1) adopting an additional analytical element applicable to systems that contain a centralized aggregation point; (2) adjusting the weight to be afforded the "behind-the-plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors, and; (3) focusing primarily on physical factors.

The July 25 Order, in considering the primary function of the subject facilities, applied the Farmland test as modified in Amerada Hess and as reformulated in Sea Robin. The Commission found that: (1) the North Padre facilities are configured in the shape similar to a "Y" with the legs branching out from the North Padre Block 956 central aggregation point; (2) the Central Texas facilities are configured in the shape of a "Y" with the legs branching out from the Brazos Block 538 central aggregation point; (3) consistent with Sea Robin, the legs upstream from the central points intersect with supply laterals throughout their length; (4) the length and diameter of the numerous pipelines are consistent with offshore gathering facilities; (5) the wellhead pressures are typical of a gathering function; (6) the absence of processing plants is of little value in assessing the primary function of facilities. Accordingly, the Commission concluded that the "primary function" of the facilities located at or upstream of North Padre Block 956 and Brazos Block 538 High Island Block 10 is gathering.

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[13] 71 FERC ¶ 61,351 (1995), *order on reh'g*, 75 FERC ¶ 61,332 (1996), *remanded sub nom. Sea Robin v. FERC*, 127 F. 3d (Fifth Cir. 1997), *reh'g denied* (February 2, 1998), *order on remand*, 87 FERC ¶ 61,384 (1999), *order denying reh'g*, 92 FERC ¶ 61,072 (2000), *order denying stay*, 92 FERC ¶ 61,217 (2000).

II. Requests for rehearing

A. Whether the abandonment of the North Padre and Central Texas facilities is in the public interest.

1. Interests of shippers and the public

Indicated Shippers state that the Commission's finding that it has no discretion to withhold authorization for the transfer of facilities, when it believes that the primary function of the facilities is gathering, is not correct.[14] Indicated Shippers state that Section 7 of the NGA makes clear that the Commission's first duty is to protect the interests of shippers and the public, rather than to accommodate Transco's and WGP's corporate objectives.

Indicated Shippers point out that the abandonment would remove certain receipt points from those available to IT-feeder shippers that ship under Transco's tariff to FT shippers. Indicated Shippers state that the public interest is not served by the unilateral termination or degradation of existing firm services or by the abandonment of IT-feeder facilities to an un-regulated affiliate. Indicated Shippers state that producers and other shippers have relied for decades on the Commission's regulation of the entirety of Transco's offshore pipeline system. Indicated Shippers state that the public interest is not served by undermining these expectations by reversing decades of prior regulatory practice. Further, Indicated Shippers state that dividing this operationally integrated system into separate regulated and unregulated parts is not in the public interest because it could undermine the Commission's open access policies.

Indicated Shippers state that Transco's abandonment application is grounded on the theory that, because Transco no longer provides bundled sales service, Transco's gathering services must be freed from the Commission's regulations in

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[14] 96 FERC at 61,435.

order to be able to compete with exempt gatherers. Indicated Shippers state that Transco has presented no evidence to support a finding that it has been unable to compete with non-NGA-regulated gathering companies. Indicated Shippers state that Transco is not concerned over whether it will be able to effectively compete in the marketplace with exempt gathers. Rather, Indicated Shippers state that Transco's real concern is over whether it will be able to take advantage of its existing control of the market in order to exact monopoly rents from shippers.

Commission response

We reaffirm our conclusion that the abandonment is required and in the public interest. As stated in the July 25 Order, where facilities are found to be used primarily in production or gathering, section 1(b) of the NGA directs that they be excluded from our NGA regulatory jurisdiction.[15] As further stated in the July 25 Order, the abandonment is consistent with unbundling policies of Order No. 636, and should, in the long run, promote competition.[16] Under the Outer Continental Shelf lands Act (OCSLA),[17] WGP will be prevented from discriminating against any shipper that seeks access to these facilities. Further, as noted in the July 25 Order, section 330.2 of our OCSLA regulations requires that WGP report the terms under which it provides service to its shippers.[18] The Commission will continue to employ its NGA authority to ensure that Transco's jurisdictional rates remain just and reasonable. And, Transco's existing tariff standards prevent it from acting in a discriminatory manner.[19] WGP has agreed to continue to serve Transco's existing customers

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[15] 96 FERC at 61,435.

[16] 96 FERC at 61,434-5.

[17] 43 U.S.C. 1301-1356.

[18] 96 FERC at 61, 435.

[19] 96 FERC at 61,434-5.

following the facilities' transfer. This should avoid any abrupt disruption to Transco's customers' expectations.

Independent entities engaged in different aspects of gas development, production, gathering, transporting, and delivery to end users are able to negotiate and rely on contractual capacity and scheduling commitments to guarantee the efficient movement of gas. Because we expect WGP, like all other offshore gatherers, will prove able to enter into service agreements with Transco, and any other transmission pipelines it may rely on, to take timely deliveries of its anticipated gas volumes, we see no need for Transco to retain ownership of its upstream gathering facilities to ensure the orderly flow of gas into its downstream transmission mainlines.

2. Effect on cost of moving gas to shore

Indicated Shippers complain that the July 25 Order transforms a single IT- feeder rate into rate-stacked charges for WGP's gathering and Transco's transmission services. Indicated Shippers state that without the constraint of rate regulation under the NGA, WGP will be able to charge shippers whatever the market will bear. Indicated Shippers state that there are no interconnections with other pipelines at the point at which the Commission finds that gathering ends and transmission begins, so shippers using the gathering facilities have no choice but to utilize Transco's remaining downstream IT-feeder transmission facilities to access Transco's mainline. Indicated Shippers state that it is not enough to say that the procedural safeguards of the OCSLA will adequately protect shippers from the market power of Transco and WGP.

Commission response

Prior to abandonment, shippers are effectively paying Transco a transportation rate that includes gathering. That gathering service will be unbundled and provided by WGP. WGP's acquisition of Transco's facilities will necessarily subject shippers on these facilities to both a gathering and a

transportation charge, where before such shippers were subject to a single Transco transportation rate. The Commission acknowledges that after the transfer of the facilities, shippers may pay a higher combined gathering fee and transportation charge to move gas between specific receipt and delivery points than the rate they now pay for bundled gathering and transportation service between the same points. However, this is neither inequitable nor an unwarranted rate stacking. As discussed in Order No. 636, it is appropriate to segregate and charge separate rates for separate services, rather than continue to compel shippers to pay a bundled charge for several distinct services.

The Commission will continue to employ its NGA authority to ensure that Transco's rates remain just and reasonable. Regarding WGP's facilities, although no State agency has authority, these facilities remain subject to federal oversight under the OCSLA. Though the OCSLA does not provide for rate regulation equivalent to that of the NGA, shippers are assured open and nondiscriminatory access to WGP's facilities. Onshore, and in state waters offshore, shippers on NGA-exempt facilities can appeal to state authorities to monitor WGPs' operations. In the event a shipper believes either Transco or WGP violates its statutory obligations under the OCSLA, the Commission encourages that shipper to submit a complaint to the Commission describing the alleged violation.[20]

B. Challenges to the primary function test

1. Should the Commission apply the OCSLA "feeder line" test instead.

Producer Coalition states that because of the close relationship between the OCSLA, the principal federal statute governing the OCS, and the NGA, the Commission should

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[20] 18 CFR § 385.206 (2001).

accord significant weight to legislative intent in formulating the jurisdictional test for OCS pipelines. Producer Coalition states that Congress has addressed the nature of gathering operations on the OCS in the 1978 OCSLA Amendments.[21] Producer Coalition states that, throughout the consideration of OCS pipeline issues, Congress equated "gathering" lines with "feeder" lines and concluded that such lines end where gas is "first separated, dehydrated or otherwise processed" on an OCS platform.[22] Producer Coalition states that the Commission erred in failing to accord the definition of gathering from the OCSLA Amendments of 1978 significant weight in its jurisdictional test. Producer Coalition states that the North Padre Island and Central Texas facilities are properly classified as jurisdictional transportation systems under the "feeder line" test.

Commission response

The Commission does not consider Congress' discussions of proposals to modify the OCSLA as guidance for jurisdictional distinctions under the NGA. The separate statutes, although complementary, have distinctly different scopes. The OCSLA applies to the full range of gas exploration, development, production, gathering, and transportation activities.[23] This is a broader regulatory sweep than the NGA which explicitly exempts facilities used for production, gathering, local distribution, and certain in-state transportation. It would be inappropriate to rely on definitions and terms of art indigenous to one statute to interpret and enforce the other. Accordingly, the Commission rejects the Producer Coalition's effort to use legislative history associated with the 1978 amendment to the OCSLA as a foundation to argue for a new NGA primary function test.

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[21] 43 U.S.C. 1301-1356.

[22] 43 U.S.C. § 1334(f)(2).

[23] 43 U.S.C. 1331(q).

2. Must Transco demonstrate changed circumstances

The July 25 Order stated that "a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the facilities for purposes of jurisdiction under section 1(b) of the NGA. How pipelines historically functionalized their facilities for rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities."[24] In addition, the Commission also stated that it found "no cause to disallow Transco the right to claim its facilities perform a gathering function, when in the past it may have advocated the facilities function as transmission."[25]

Indicated Shippers state that while historical functionalization alone may not be determinative, the prior treatment of the facilities by both Transco and the Commission should be given presumptive effect in the absence of a showing of changed circumstances. Indicated Shippers state that given Transco's prior arguments to the Commission that the facilities were transmission, Transco should be estopped from now arguing that they are gathering.

***6** Indicated Shippers state that Transco has failed to show a change in circumstance that would demonstrate that the subject facilities are now gathering. Indicated Shippers state that the Commission offers no reasoned explanation why restructuring served to change the function of Transco's facilities, particularly given that the Commission's prior findings that the facilities are properly treated as transmission was made in conjunction with Transco's restructuring. Indeed,

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[24] July 25 Order at 61,436, citing *Southern Natural Gas Company, et. al.*, 79 FERC ¶ 61,076 at 61,379 (1997).

[25] *Id.*

Indicated Shippers state that Transco itself previously argued that restructuring served to reinforce the fact that all of its pipeline facilities provide a transmission function.

Indicated Shippers state that the Commission's decision here to change the pre-existing functionalization of certified facilities in the shallow waters of the OCS is in direct conflict with the OCS Policy Statement that indicates that the Commission would preserve the existing status of interstate pipeline facilities in the shallow water of the OCS.

Commission response

The OCS Policy Statement was explicit that "existing interstate pipelines and gathering facilities would retain their status barring some change in circumstances."[26] Nevertheless, the OCS Policy Statement must be read in light of the subsequent opinion in Sea Robin v. FERC, which determined that nonphysical factors such as ownership and prior certification are considerations secondary to physical factors.[27] In any event, the OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. The July 25 Order accepted Transco's claim that reclassification is merited as a response to Order No. 636. As the July 25 Order noted, after Order No. 636:

> numerous interstate pipeline companies found portions of their system's facilities were no longer required in order to provide certain certificated services. Where we found such facilities were employed to gather gas supplies needed to ensure a pipeline's capability to fulfill

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[26] Gas Pipeline Facilities and Services on the Outer Continental Shelf - Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 at 61,757 (1996), *order dismissing reh'g*, 75 FERC ¶ 61,291 (1996) (OCS Policy Statement).

[27] 123 F.3d at 371.

merchant sales obligations, a function that is no longer offered, we permitted pipelines to abandon such facilities.[28]

Second, Order No. 636 aside, a pipeline company can submit an abandonment application at any time, and the Commission will consider the reasons presented for requesting a review of the company's facilities' classification. We have acknowledged that the facilities were constructed, owned, and operated by Transco, historically an NGA-regulated interstate transportation provider. Nevertheless, we found that changed circumstances, principally Transco's reorganization in response to Order No. 636, tempered this indicator that the facilities were dedicated to interstate transportation.

3. Does the Central point of aggregation factor create a single factor test

As stated earlier, in Sea Robin, the Commission reformulated the modified primary function test adding a new "centralized aggregation point" factor for determining the jurisdiction of facilities on the OCS.

In Sea Robin the Commission found that gathering ends and transmission begins at the point where two or more segments of an OCS pipeline join for the last time and a single line moves natural gas towards shore.[29] The Commission refers to this as the "centralized collection point," or "central aggregation point," which is the point at which the gas collection/aggregation process on an OCS interstate pipeline ends.

Indicated Shippers complain that the Commission's analysis in Sea Robin is inherently flawed. Indicated Shippers state that this new test permits the Commission to find a point on a

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[28] 95 FERC ¶ 61,337 at 62,232 (footnote omitted).

[29] *Sea Robin*, 87 FERC at 62,430-431.

pipeline where the largest diameter pipeline on the system begins or where all upstream lines converge, and to designate that point as the demarcation point where gathering ends and transportation begins. Indicated Shippers state that this test would essentially eliminate any evaluation of the physical, geographical, and operational factors traditionally considered by the Commission in distinguishing gathering from transportation. Indicated Shippers state that in place of the primary function test, Sea Robin essentially establishes the very type of bright line test for which the Commission was admonished by the Fifth Circuit.[30] Indicated Shippers state that under this test the Commission would look for the central point on a pipeline system without reference to the nature of the upstream facilities and their relationships with producers' wells and other facilities.

Producer Coalition makes a related argument that because three of the factors contained in the modified primary function test produce three mutually exclusive jurisdictional results, the Commission, by necessity, must select one factor to predominate in order to reach a jurisdictional determination. Producer Coalition state that if the Commission gives principal emphasis to the "behind the plant" location of facilities, all OCS facilities will be declared non-jurisdictional, because all processing plants downstream of OCS pipelines are located onshore.[31] Alternatively, Producer Coalition state that if the Commission gives principal emphasis to length and diameter of the pipeline, most major OCS systems will be found jurisdictional. Third, Producer Coalition state

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[30] Citing, *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989).

[31] Because of this fact, Producer Coalition state that the Commission has effectively disregarded the behind-the-plant factor in determining the jurisdictional status of OCS facilities. Sea Robin II, 87 FERC 62,428; Enron Gulf Coast Gathering, 95 FERC ¶ 61,318; *Trunkline Gas Company, et al.*, 95 FERC ¶ 61,337 (2001); *and Seahawk Transmission Co.*, 95 FERC 61,342 (2001).

that if the Commission relies on the "central point of aggregation factor," the great bulk of OCS pipelines will be found non- jurisdictional except for the lines that run from the last major intersection offshore to the onshore terminus of a system. Producer Coalition state that while the other factors contained in the modified primary function test, i.e., (i) location of wells along all or part of the facility; (ii) geographic configuration; (iii) line pressure; and even (iv) the nature of the company that owns and operates the facilities-can be interpreted in a manner to support each of the above jurisdictional results, the results themselves cannot be reconciled with each other. Producer Coalition reason that use of the modified primary function test necessarily involves the selection of one dominant factor, which is determinative of the outcome. Producer Coalition state that that factor, however, becomes the "bright line" standard, which runs afoul of the Fifth Circuit's conception of reasoned decision-making.

Commission response

The above line of arguments largely represents a collateral attack on the Commission's reasoning in Sea Robin and is rejected for that reason. In addition, Indicated Shippers and Producer Coalition misread the July 25 Order. For both the Sea Robin and Transco systems, all relevant criteria of the Farmland test, as modified with respect to offshore facilities, were afforded appropriate consideration. In this case, not all factors pointed to the same primary function—a result commonly encountered in applying our multi-factor test—thereby compelling the Commission to weigh each factor to balance the conflict presented. In the July 25 Order, in addition to the location of points of aggregation, the Commission found that the configuration of the facilities, the lack of compression, and the size and scope of the pipelines also demonstrated a gathering function.[32] The Commission found

[32] July 25 Order at 61,440-441.

that the absence of processing plants was of little value in guiding the determination on the primary function of the facilities.[33] Although the Commission did identify a single, central point of aggregation, the primary function finding did not rest solely on this feature (or on any other single factor) of the system. The claim that under our primary function test, the Commission is compelled to select a single factor and let it dominate to determine jurisdiction, is rejected.

C. Challenges to the application of the primary function test

1. Configuration

Indicated Shippers state that even if the Sea Robin "central point of aggregation" analysis is lawful, the Commission's selection of the North Padre Island Block 956 and Central Texas Block 538 as the demarcation points is inappropriate. Indicated Shippers states that Maps 11W and 4W fail to reflect the many smaller pipeline facilities forming "Y" configurations along the North Padre and Central Texas facilities and going out to the actual wells. Indicated Shippers state that the Commission should not ignore the configuration of these upstream facilities, which aggregate gas and provide the gathering function on the system. Indicated Shippers state that the facilities downstream of these smaller lines should be treated as transmission.

Indicated Shippers state that the location of wells, for the most part, appear to be remote from Transco's facilities. Indicated Shippers state that production is brought to Transco in smaller gathering lines. Accordingly Indicated Shippers state that, the gathering function is provided by other parties, whose facilities bring gas to Transco's trunk lines. For example, Indicated Shippers state that the map of the North Padre facilities shows numerous wells, purportedly served by

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[33] *Id.*

Transco's facilities, that are located off Transco's lines.[34] Indicated Shippers state that likewise the map of Central Texas facilities shows numerous wells, purportedly served by Transco's facilities, that are located off Transco's lines.[35] Although Indicated Shippers agree with the Commission's finding that this alone would not disqualify the lines from a finding of gathering, Indicated Shippers argue that this is yet another piece of evidence that supports a finding that the subject facilities are transmission and not gathering.

Commission response

In Sea Robin, the Commission took note of the court's observation that, while the task in a case may be difficult, the Commission must squarely address the fact that the demarcation point between gathering and transmission may be located at a point internal to the overall system.[36] The Commission explained that the most logical demarcation point may be the "coincidence of several smaller lines at a centralized location where the gas carried is delivered into a single, larger-diameter line for further delivery to market."[37] As noted by Indicated Shippers, for every offshore system, there are multiple Y junctions, from the first offshore interconnection point to the junction at which the line furthest seaward is tied back in. The task then is to determine which of these several Y interconnects may merit the distinction of being the point of aggregation at which gathering ceases and transmission starts. A primary function review of the traits of all potential legs and trunks is required.

As to the North Padre facilities, the Commission found that the North Padre Island Block 956, where the 10-inch and 20-

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[34] *See* Abandonment Application, Exhibit B (map 11W).

[35] *See* Abandonment Application, Exhibit B (4-w).

[36] 92 FERC ¶ 61,072 at 61,290.

[37] 92 FERC ¶ 61,072 at 61,290.

inch legs, which gather the gas, converge to form a single 24-inch line that transports the gathered gas onshore . . . functions as an aggregation point . . . indicating a demarcation of gathering and transmission functions."[38] Similarly, the Commission found that Brazos Area Block 538 platform, where the 6-to 30-inch lines converge and feed into the 30- and 36-inch lines that move the gas onshore, is the central point of aggregation on the Central Texas System.[39] Although, not exhibiting as strong an indication of a marked change as was the case in Sea Robin,[40] the Commission found that Transco's North Padre Island Block 956 and Brazos Area Block 538 platform functioned as aggregation points. The configuration of these points implied a transition from gathering to transmission, a finding that was accepted only after applying the multi-factor methodology to the rest of Transco's facilities.

2. Size

The North Padre facilities to be abandoned consist of 3.83 miles of 10-inch pipeline and 18.79 miles of 20-inch pipeline. The Central Texas facilities to be abandoned consist of 270.32 miles of pipeline: over 41 miles of 30-inch pipeline, over 23 miles of 24-inch pipeline and over 116 miles of 20-inch pipeline.

Indicated Shippers state that although *EP Operating Co. v. FERC*,[41] stands for the proposition that the Commission should not improperly overemphasize the length of the

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[38] July 25 Order at 61,440.

[39] July 25 Order at 61,441.

[40] In Sea Robin, the central point of aggregation was a manned offshore platform at which two smaller lines merged into a single larger line, significant compression facilities were located on the platform, and the platform was situated as a point geographically central to the Sea Robin system.

[41] 876 F.2d 46 (5th Cir. 1989).

pipeline in its primary function analysis, length is still an important factor to consider. Indicated Shippers complain that in the July 25 Order, the Commission failed to take into account the overall length of the pipeline facilities in its determination that the Central Texas facilities perform a gathering function. Indicated Shippers argue that the North Padre and Central Texas facilities have the size and other physical characteristics that support a finding that they provide a transmission function.

Indicated Shippers note that out of a combined 292.94 miles of pipeline at issue, roughly 286 miles of the pipeline consist of pipe with a diameter equal to or greater than 12 inches. Indicated Shippers state that Seahawk Shoreline System,[42] illustrates that 12-24 inch pipeline facilities can qualify as transmission facilities. Indicated Shippers state that the subject lines are appropriately sized not to gather the large volumes of gas, but rather to transport the large volume of gas. Likewise, Indicated Shippers state that it is very common for wells to be located along transmission lines. Therefore, Indicated Shippers state that the presence of wells alone should not have an impact on the jurisdictional status of the North Padre and Central Texas facilities.

Commission response

The Commission has adopted no bright line test regarding the size of jurisdictional offshore facilities. Although size generally correlates with function, large offshore facilities need not be summarily disqualified from gathering status if the other characteristics of the facilities are indicative of a gathering function.[43] Facilities as large as typical transmission

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[42] 93 FERC ¶ 61,097 (2000) *order denying reh'g*, 95 FERC ¶ 61,342 (2000).

[43] *See Amerada Hess*, 52 FERC P61,268 (1990) (discussion of and response to *EP Operating v. FERC*, 876 F.2d 45 (5th Cir. 1989). *See also Viosca Knoll*, (finding a relatively long, large line gathering).

lines may nevertheless be found to be gathering when other primary function factors demonstrate characteristics consistent with gathering.[44] Likewise following review of the Farmland factors, we have also determined that systems smaller than these perform a transmission function.[45]

In this case, the Commission applied the several factors of the primary function test. Not all factors were found to be relevant or uniform, and certain factors exhibited more value or weight than others. The subject lines' large diameters, a usual indicator of a transmission function, was outweighed by other characteristics denoting a gathering function. The Commission affirms the prior determination that on balance the factors indicate that the facilities to be abandoned perform primarily a nonjurisdictional gathering function.

3. Pressure

Indicated Shippers argue that the pressure ranges of the subject facilities, between 750 and 900 psig for North Padre facilities and between 725 and 1,200 psig for Central Texas facilities, also indicate a transmission function. Indicated Shippers state that these pressure ranges reflect neither the very high nor low operating pressures frequently seen in gathering lines. Indicated Shippers state that the absence of compression does not undermine this view: it simply reflects that compression was unnecessary, and sheds no light on whether the facilities are gathering or transmission.

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[44] Offshore, a 28-inch diameter line has been found to be gathering. Exxon Corporation, 45 FERC P61,436 (1988). However, that diameter was found in 9.5, 7.9, and 6.1 -mile segments of a 36.7-mile system that was producer owned, carried only sour gas, included no compression, and performed production as well as gathering.

[45] *See, e.g., Louisiana Intrastate Gas Corporation*, 69 FERC ¶ 61,022 (1994) (a system composed of 1.34 miles of 4-inch diameter pipe and 21.94 miles of 16-inch diameter pipe that serves to carry gas from OCS production areas to shore).

Commission response

There is no compression located along the North Padre or Central Texas facilities, which means that the systems operating pressures are a function of the wellhead pressures. The wellhead pressures act to push the gas through the facilities, which is typical of a gathering function, unlike compression, which is typical of a transmission function. While these pressures would indicate a transportation function onshore, they must be viewed, here, in the offshore context. These pressures are consistent with the nature of offshore production and comparable to operating pressures of other offshore facilities found to be gathering.[46] Accordingly, the Commission affirms the prior determination that the pressure factors indicate that the facilities to be abandoned perform primarily a nonjurisdictional gathering function.

4. Shallow water factor

Indicated Shippers point out that the OCS Policy Statement[47] provides that new facilities located in water depths of 200 meters or greater will be presumed to be gathering.[48] Indicated Shippers state that the Commission failed to give any weight to the fact that the North Padre and Central Texas facilities are located in the shallow waters of the OCS.

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[46] *See, e.g., Northern Natural Gas Company*, 93 FERC ¶ 61,101 (2000) (offshore facilities operating at pressures between 1,050 and 1,200 psig found gathering) and *Tarpon Transmission Company*, 78 FERC ¶ 61,278 (1997) (offshore facilities operating at pressures between 1,100 and 1,250 psig found gathering).

[47] Gas Pipeline Facilities and Services on the Outer Continental Shelf - Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 (1996), *order dismissing reh'g*, 75 FERC ¶ 61,291 (1996) (Policy Statement).

[48] *Id.* at 61,757.

Commission response

As noted in the July 25 Order, the OCS Policy Statement added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more.[49] The OCS Policy Statement creates a presumption that these deep water facilities are gathering facilities up to the point or points of interconnection with the interstate pipeline grid. There is no corollary rebuttable presumption that facilities located in shallow water are transmission. Rather, the Commission considers a facility's location in shallow water as one among several criteria in assessing the primary function. While almost all NGA-regulated pipe is located in shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and gathering facilities. Accordingly, a particular facility's placement in shallow water, standing alone, is a poor predictor of that facility's primary function (in contrast, in deep water, almost all facilities are engaged in production or gathering). The shallow water location must be viewed in the context of a facility's other characteristics in order to reach any meaningful assessment of its primary function. In this case, the shallow water location of the subject facilities was not as substantial a factor as the facilities' other characteristics.

5. Integrated Pipeline System

Indicated Shippers believe that the nature of Transco's integrated pipeline system provides strong evidence in support that the primary function of Transco's North Padre and Central Texas facilities continue to be transmission. Indicated Shippers state that there is no reasoned basis to conclude that the primary function of one portion of an integrated system is gathering, and the other is transmission.

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[49] July 25 Order at 61,437.

Commission response

In Sea Robin the Commission rejected the position that the Commission should consider an entire pipeline system gathering if the "integrated" nature of the system, as a whole, is designed to transport gas from production areas to onshore locations. The Commission explained that such a finding would violate the Commission's responsibility to draw jurisdictional lines, even when the end of gathering is not easily located, as for example, when it occurs at a point internal to an overall system.[50] For the same reason, we reject the contention that the integrated nature of Transco's system precludes us from finding that a portion of the system is gathering.

6. Historical certification and business purpose

Indicated Shippers argue that the Commission erred in its conclusion that the historical certification of Transco's facilities is not relevant to the current primary function of the facilities and in failing to give due weight to the business purpose of the subject facilities. Indicated Shippers are in agreement with the Commission in that the "business purpose" of the subject facilities is only one factor to consider in determining the primary function of the North Padre and Central Texas facilities. However, Indicated Shippers argue that because the business purpose of the pipeline provides strong evidence of a pipeline's functionalization, it should be considered a central factor. Indicated Shippers argue that where the owner of pipeline facilities is in the business of transportation for hire, and has historically operated the pipeline as an integrated interstate pipeline system, the primary function of the pipeline is most likely transmission.

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[50] 92 FERC ¶ 61,072 at 61,290.

Commission response

In the past, when a pipeline applied for a certificate to construct facilities, the Commission did not inquire into the pipeline's prospective use of the facilities before issuing the certificate. Consequently, many facilities that actually may perform a gathering function originally were constructed under NGA section 7 certificates. Therefore, until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined.[51]

The offshore facilities at issue here were installed under NGA certificate authority and have continued to be functionalized by Transco as transmission for many years. Nonetheless, in making jurisdictional determinations on the OCS, and indeed, onshore as well, the physical characteristics of the particular pipeline systems are the more significant factors, and each determination must be made on the basis of its own specific fact situation.[52] Here, such non-physical aspects are not compelling enough to overcome the overwhelming physical evidence

D. Challenge to the rate adjustment

Transco seeks rehearing of the requirement that it adjust its rates to remove the cost of the North Padre and Central Texas facilities in its current rate proceeding in Docket No. RP01-245-000.[53] Pending the Commission's action on rehearing, Transco also requests that the Commission grant a limited stay of the July 25 Order's rate adjustment requirement. As discussed below, the request for rehearing on this issue is granted. Therefore, the motion for stay is moot.

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[51] *See*, CNG Transmission Corporation, 67 FERC P61,330, at 62,177 (1994).

[52] *Sea Robin*, 127 F.3d 365 at 371.

[53] 96 FERC at 61,442, Ordering paragraph E.

Transco states that having now received the Commission's Order granting abandonment and transfer, Transco and WGP must make the modifications necessary to permit operation of these facilities on a stand-alone basis, and must negotiate contracts to govern post-spin down services on these facilities. Transco states that for a variety of reasons, it does not believe that such transfer will close until well into 2002, at the earliest.

Transco states that the July 25 Order contains no findings under either NGA Sections 4 or 5 that the North Padre and Central Texas facilities will not be in service through the test period in Docket No. RP01-245-000, or that Transco's rates to be effective September 1, 2001, will be unjust or reasonable. Transco states that Section 5(a) requires such findings before the Commission may lawfully adjust a pipeline's rates.[54] Transco states that to require Transco to remove the cost of these facilities from jurisdictional rates while such facilities continue to render jurisdictional service would be unlawful under these NGA sections, which require that a pipeline be afforded an opportunity to earn a fair return on its investment in jurisdictional facilities and to recoup its costs in rendering jurisdictional service.[55]

KeySpan, et al., argue that the timing of the transfer is a matter within the control of the contracting parties and Transco's customers should not be required to continue to pay for facilities that are not necessary to provide their jurisdictional services simply because the transfer has not occurred as expeditiously as Transco had planned.

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[54] 15 U.S.C. 717d(a). Transco cites *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993).

[55] Transco cites *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

Commission response

In its application in Docket No. CP01-34-000, Transco proposed to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of [the July 25 Order], or at a mutually agreeable date thereafter. Thus, the transfer was expected to occur as early as August 31, 2001. However, the transfer did not take place at that time. The test period in Transco's current general rate proceeding in Docket No. RP01-245-000 expired on August 31, 2001, and the proposed rates became effective on September 1, 2001.[56] The

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[56] On March 1, 2001, in Docket No. RP01-245-000, Transco filed revised tariff sheets to reflect a general NGA section 4 rate increase. The Commission exercised its discretion to accept and suspend the rates to take effect on September 1, 2001, subject to conditions and subject to refund and the outcome of a hearing. Transcontinental Gas Pipe Line Corporation, 94 FERC ¶ 61,360 (2001). On August 31, 2001, in Docket No. RP01-245-003, Transco filed a motion to place the suspended tariff sheets into effect on September 1, 2001. Among other things, Transco stated that it had eliminated the costs associated with facilities not in service as of August 31, 2001, but had not reflected any adjustments in the compliance rates for the subject facilities for which abandonment was granted. By order issued September 27, 2001, the Commission accepted the revised tariff sheets to be effective September 1, 2001, subject to refund, the outcome of the hearing established in Docket No. RP01-245-000, and the certificate proceedings in Docket Nos. CP01-34-000, CP01-103-000 and CP01-368-000. Transcontinental Gas Pipe Line Corporation, 96 FERC ¶ 61,345 (2001) (September 27 Order). The Commission also directed Transco to file revised tariff sheets, within 15 days of the date of issuance of that order, reflecting the removal of the costs of the facilities abandoned in the certificate proceedings.

On October 9, 2001, in Docket No. RP01-245-005, Transco filed a Request For Clarification Or, In The Alternative, For Rehearing, of the September 27 Order (October 9 Request). Transco also requested a limited stay that sought an extension of time within which to comply with the September 27 Order. The motion states that because Transco's books and records would have to be reconstructed in order to calculate the costs required by the Commission's Order, compliance is not possible within

Commission's regulations only require removal of the costs of facilities that will not be in service as of the end of the test period.[57] Hence, the Commission's regulations and ratemaking policies did not require that Transco remove the cost of those facilities and costs from the rates that went into effect on September 1, 2001, subject to refund. Accordingly, rehearing is granted. The order in Docket No. RP01-245-005, issued concurrently, directs Transco to refile its rates to reflect the removal of the North Padre Island facilities, effective December 1, 2001.

Nonetheless, the Commission's finding in the July 25 Order that Transco must remove the costs of the facilities that it will abandon from its prospective rates was grounded on the sound ratemaking principal that just and reasonable jurisdictional rates cannot be based on the costs of facilities not owned by the pipeline, not in service, and not needed to provide service to jurisdictional customers. Thus, it would seem unjust and unreasonable for Transco to continue to charge rates designed to afford Transco the opportunity to recover the cost of and earn a fair return on an investment in the subject facilities at such time that it no longer owns them and no longer uses them to provide jurisdictional service.

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the 15-day deadline. On November 6, 2001, an extension of time was granted until 30 days after the Commission acts on Transco's October 9 Request. The Commission order in Docket No. RP01-245-005 is being issued concurrently with the instant order.

[57] Section 154.303(c)(2) of the Commission's regulations states:

> When a pipeline files a motion to place the rates into effect, the filing must be revised to exclude the costs associated with any facilities that will not be in service as of the end of the test period . . . At the end of the test period, the pipeline must remove from its rates costs associated with any facility that is not in service. . . .

97 FERC P 61,296, 2001 WL 1631914 (F.E.R.C.)

On December 10, 2001, Transco filed a letter informing the Commission that the transfer of the North Padre Island facilities became effective on December 1, 2001; however, the transfer of the Central Texas facilities had not yet been implemented. Accordingly, as to the Central Texas facilities not yet abandoned as of the date of this order, we shall direct Transco to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned Central Texas facilities, 30 days prior to the effective date of the transfer of those facilities.

III. Request for clarification

Indicated Shippers ask that the point at which gathering ends and transmission begins be better identified than in the July 25 Order. Indicated Shippers state that simply identifying a particular platform is not sufficient because a more specific identification becomes critical for new interconnections to the platform. Indicated Shippers state that if Transco deems the interconnect to be upstream of the point of demarcation between gathering and transmission, the pipeline and its affiliate could argue that a gathering fee must be paid for a very short haul of gas from one point on the platform to another. In order to avoid this sort of rate stacking, Indicated Shippers request that the Commission clarify that all of the facilities at the platform at which gathering ends are to be treated as transmission; and, only facilities upstream of the platform should be gathering. In this way Indicated Shippers state that, there will be no question that new interconnects at the platform will not bear a gathering charge for short hauls on the platform.

Commission response

The Commission clarifies that facilities upstream of the jurisdictional demarcation platform have been found to be gathering, and facilities downstream have been found to be transmission. However, the Commission denies the request to clarify that all of the facilities at the jurisdictional demarcation platform are to be treated as transmission. An OCS platform may be constructed to serve many functions, such as an aggregation point for numerous lines, and/or to provide separation, dehydration, and other production and transmission services. Basically, facilities on the platform involved with bringing gas to the platform are gathering and facilities involved in sending gas toward shore are transmission. Facilities that separate or dehydrate are also performing production and gathering functions. Although unusual in offshore situations, compression facilities would most likely be involved in transmission. New interconnections to the platform should be functionalized accordingly.

The Commission orders:

(A) The requests for rehearing are granted or denied as discussed in this order.

(B) Pursuant to section 5 of the Natural Gas Act, Transco is directed to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the Central Texas facilities, 30 days prior to the effective date of the transfer.

(C) Within 15 days of the issuance date of this order, WGP must file an OCSLA Reporting Form and the conditions of service for each shipper served with respect to the acquired facilities (and the services rendered through those facilities) and continue to do so

thereafter, in accordance with section 330.2 of the Commission's regulations.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.,
Acting Secretary.

APPENDIX H

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

[Filed August 31, 2001]

Docket Nos. CP01-368-000 and RP01-245-000
Docket No. CP01-369-000

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing-Gulf Coast Company, L.P.

ORDER AUTHORIZING ABANDONMENT AND DETERMINING JURISDICTIONAL STATUS OF FACILITIES

Before Commissioners: William L. Massey, Linda Breathitt, Pat Wood, III and Nora Mead Brownell.

On May 18, 2001, Transcontinental Gas Pipe Line Corporation (Transco) submitted an application in Docket No. CPO 1-368-000, pursuant to section 7(b) of the 'Natural Gas Act (NGA), seeking Commission approval to abandon certain facilities located offshore and onshore Louisiana (Central Louisiana facilities) to its gathering affiliate, Williams Gas Processing-Gulf Coast Company, L.P. (WGP). On the same date, WGP submitted a petition in Docket No. CPO 1-369-000 requesting that the Commission declare that the facilities it proposes to acquire from Transco will, upon abandonment by transfer to WGP, be gathering facilities exempt from the Commission's NGA jurisdiction.

For the reasons discussed below, we will approve Transco's requested abandonment, in part, and declare a portion of the facilities to be gathering. The facilities not found to be gathering will remain transmission.

I. Background and Proposal

The requested abandonment is part of an ongoing corporate-wide restructuring by The Williams Companies, Inc. (Williams), corporate parent of Transco and WGP, to abandon and transfer (spindown) gathering facilities from Transco and the other Williams-affiliated interstate pipelines to nonjurisdictional gathering companies. The facilities under consideration in these dockets were part of a more comprehensive gathering spindown request filed by Transco and WGP in Docket Nos. CP96-206-000 and CP96-207-000.[1] Those applications were dismissed without prejudice to the applicants' filing another proposal addressing discrete portions of the facilities. Transco states that it has reviewed its gathering facilities on a system-by-system basis under the Commission's primary function test, as reformulated following the courts direction in the Sea Robin Pipeline Company (Sea Robin) proceeding.[2] Transco states that this application is part of an effort to spindown gathering facilities under the principles of Sea Robin.

Transco states that most of the facilities comprising the Central Louisiana Gathering System are the subject of various NGA section 7(c) certificates issued by the Commission. Transco states that at the time they were acquired or constructed, these gathering facilities were used almost exclusively to deliver system supply gas to support bundled sales services. Transco states that under that historic structure, Transco did not have a need to precisely distinguish between jurisdictional transmission and exempt gathering facilities.

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[1] *Transcontinental Gas Pipe Line Corporation*, 76 FERC ¶ 61,317 (1996), *order denying reh'g*, 95 FERC ¶ 61,396 (2001).

[2] 71 FERC ¶ 61,351 (1995) (Sea Robin I), *order on reh'g*, 75 FERC ¶ 61,332 (1996), *remanded Sea Robin v. FERC*, 127 F. 3d 365 (5th Cir. 1997), *reh'g denied* (February 2, 1998), *order on remand*, 87 FERC ¶ 61,384 (1999) (Sea Robin II), *order denying reh'g*, 92 FERC ¶ 61,072 (2000), *order denying stay*, 92 FERC 61,217 (2000).

Accordingly, the fact that many of the subject facilities were constructed pursuant to NGA certificates is not an indication of whether the facilities actually qualify for exempt gathering status under NGA section 1(b). Transco states that under the Commission's current reformulated primary function test, the Central Louisiana facilities perform primarily a gathering function.[3]

Transco also requests authorization to abandon services under 17 existing individually certificated X-rate schedules.[4] Transco states that no gas has flowed under any of the X-rate schedule service agreements since 1993. Transco also seeks authority to partially abandon 14 Part 284 services agreements insofar as they pertains to specific receipt points on the Central Louisiana facilities.[5] Transco states that upon abandonment and transfer of the requested facilities to WGP, the referenced receipt points will no longer be available to be used by shippers under the affected blanket services or as a balancing point under a Pipeline Interconnect Balancing Agreement. Transco states that upon approval of this application, Transco will amend affected service agreements and file the necessary conforming changes to its FERC Gas Tariff, such as the termination of tariff sheets and removal of references to the abandoned points/facilities.

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[3] *See WGP's Petition at Sections VII and VIII, appeal docketed Exxon-Mobil, et. al., v. FERC*, Civ. No. 00-1355 (D.D.C. filed Aug. 2, 2000).

[4] The following rate schedules are proposed to be abandoned: X-35, X-78, X-128, X-152, X-157, X-197, X-215, X-263 (Florida Gas), X-43, X-159 (Koch Gateway), X-97, X-223 (Columbia Gas), X-257 (Columbia Gulf), X-143 (ANR), X-170 (Northern Natural), X-256 (Conoco/DuPont), X-261 (TGX Corp.).

[5] The following Part 284 firm agreements are to be partially abandoned: BG&E, Brooklyn Union, City of Richmond, Corning Natural Gas Corp., East Ohio Gas Company, National Fuel Gas Dist. Corp., Niagara Mohawk Power Corp., PPL Gas Utilities, Providence Gas Co., Public Service N. Carolina, Rochester Gas & Electric, Virginia Natural Gas, Washington Gas Light, and Motiva Enterprises, LLC.

Transco proposes to transfer the subject facilities to WGP under a Transfer and Assignment Agreement dated February 19, 1996, as amended on December 29, 1997, at net book value at the time of closing, resulting in no gain or loss to Transco. Following a Commission order approving abandonment acceptable to Transco and WGP, Transco proposes to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of such order, or at a mutually agreeable date thereafter. Transco will notify the Commission within ten business days of the transfer of the facilities. Transco states that if this abandonment is approved prior to Transco's next general NGA section 4 rate case filing, then in accordance with Transco's rate settlement in Docket Nos. RP97-71-000, *et al.*, Transco will make a rate filing as necessary to reflect the spindown after Commission approval. Transco states that the depreciated net book value of these facilities is approximately $5,493,381 as of April 30, 2001.

Transco states that the application to abandon and transfer the central Louisiana facilities is consistent with Williams' ongoing corporate restructuring, whereby the gathering facilities of Williams' interstate pipelines have been unbundled and spundown to companies focused on providing gathering services. Transco states that the spindown of gathering facilities by Williams' interstate pipelines, other than Transco, is largely complete. The Commission has approved those prior spindowns, finding that they will serve the public interest and are consistent with the Commission's industry restructuring and pro-competitive policies.[6] Transco states that for the same reasons, the Commission should likewise approve the instant application.

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[6] *Transcontinental Pipe Line Corporation*, 96 FERC 61,115 (2001); *Transcontinental Pipe Line Corporation*, 96 FERC 61,118 (2001).

Transco states that WGP's parent, Williams Field Services Company, is currently operating the subject facilities as Transco's agent and WGP plans to negotiate post-spindown service agreements with all shippers.[7] Transco states that WGP will continue to operate the facilities in an open and nondiscriminatory manner. In that regard, while the spun-down facilities will not be subject to the Commission's NGA jurisdiction, the facilities are subject to the Outer Continental Shelf Lands Act (OCSLA)[8], which mandates that all Outer Continental Shelf (OCS) pipelines provide "open and non-discriminatory access" to their OCS facilities.[9]

In prior spindown cases, the Commission has required the pipeline to adopt tariff provisions ensuring that it will not provide any undue preference to affiliates. Transco states that Section 36 of the General Terms and Conditions of Transco's tariff already includes such provisions.

II. Description of facilities

Transco states that the Central Louisiana facilities are located in the East Cameron and Vermilion Areas, offshore Louisiana, and in Acadia, Jefferson Davis, and Vermilion Parishes, Louisiana. Transco states that both the offshore and onshore facilities gather and move gas into either of two adjacent nonjurisdictional processing plants (the Cow Island Processing Plant owned by El Paso Field Services Company and the Vermilion Processing Plant owned by Williams Field Services-Gulf Coast Company, L.P.) located in Vermilion Parish, Louisiana for processing and redelivery into Transco's system.

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[7] Transco states that in previously filed spindown abandonment applications in Docket Nos. CP01-34-000 and CP01-103-000, Transco erroneously stated that WGP itself acts as Transco's agent. Transco states that the agency relationship indicated above is correct.

[8] 43 U.S.C. § 1331, *et seq.*

[9] 43 U.S.C. § 1334(f)(l)(A).

The Central Louisiana facilities consist of approximately 380.255 miles of 2- inch to 24-inch pipeline, as follows:

0.74 miles of 2-inch pipeline
0.63 miles of 3-inch pipeline
6.996 miles of 4-inch pipeline
41.411 miles of 6-inch pipeline
35.674 miles of 8-inch pipeline
13.695 miles of 10-inch pipeline
79.336 miles of 12-inch pipeline
17.637 miles of 14-inch pipeline
78.874 miles of 16-inch pipeline
26.283 miles of 18-inch pipeline
41.727 miles of 20-inch pipeline
37.252 miles of 24-inch pipeline

Certain segments of the Central Louisiana facilities are jointly owned by Transco and other third parties.[10] The Central Louisiana facilities proposed to be abandoned include a number of valves, meters and related appurtenant pipeline facilities located throughout the systems. These related facilities constitute an integral part of the nonjurisdictional gathering function of the facilities sought to be abandoned and are also proposed to be abandoned and declared nonjurisdictional.

III. WGP's Petition for Declaratory Order

WGP states that the Central Louisiana facilities should be declared nonjurisdictional gathering facilities because: (1) the length and diameter of the pipelines are relatively small; (2) numerous wells are located throughout the system; (3) the operating pressures are consistent with both onshore and offshore gathering; (4) all the facilities are located upstream

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[10] Transco states that CNG Transmission Corp. (now Dominion Transmission, Inc.), Columbia Gulf Transmission Co., Florida Gas Transmission Co., and Sea Robin Pipeline Co. also have ownership interests.

of the Cow Island Processing Plant; (5) the system is configured in a spine and lateral configuration, which is consistent with a gathering function; and (6) the system has no compression and its operating pressures are consistent with both onshore and offshore gathering facilities.

Interventions and Protests

Transco's application for abandonment authorization in Docket No. CPO 1-368- 000 was published in the Federal Register on June 1, 2001[11] Timely, unopposed motions to intervene were filed by companies as listed in the Appendix to this order.[12] Superior Natural Gas Corporation and Walter Oil & Gas Corporation, and the Producer Coalition filed untimely motions to intervene. We find that granting the motions to intervene out-of-time will not delay the proceeding, prejudice the rights of any party, or place an additional burden on existing parties. Accordingly, for good cause shown, we will grant the late-filed motions to intervene.[13] Consolidated Edison Company of New York (Con Ed), Indicated Shippers, Producer Coalition, the Public Service Commission of the State of New York (New York), and Superior Natural Gas Corporation and Walter Oil & Gas Corporation (Superior/Walter) filed protests. The City of Richmond, Virginia (Richmond), Public Service Company of North Carolina, Inc. (North Carolina), and the Transco Municipal Group and the Municipal Gas Authority of Georgia (collectively Municipal Group) filed comments.

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[11] 66 FR 29788.

[12] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2001).

[13] 18 CFR § 385.214(d) (2001).

WGP's petition for a declaratory order in CP01-369-000 was published in the Federal Register on June 4, 2001.[14] Timely, unopposed motions to intervene were filed by companies as listed in the Appendix to this order.[15] Phillips Petroleum Company and Phillips Gas Marketing Company filed untimely motions to intervene. We find that granting the motions to intervene out-of-time will not delay the proceeding, prejudice the rights of any party, or place an additional burden on existing parties. Accordingly, for good cause shown, we will grant the late-filed motions to intervene.[16] Indicated Shippers, the Producer Coalition and Superior/Walter filed protests.

On July 19, 2001, Transco and WGP filed answers to the protests and comments previously filed. Although our procedural rules do not permit answers to protests, or answers to answers, we may, for good cause, waive this provision.[17] We find good cause to do so in this instance in order to insure a complete and accurate record in this proceeding.

We address the substance of the protests and responsive pleadings below.

IV. DISCUSSION

A. Abandonment

Since the facilities proposed to be abandoned were certificated to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the abandonment of Transco's certificated interests in the OCS facilities requires Commission authorization under NGA section 7(b).

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[14] 66 FR 29937.

[15] Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 CFR § 385.214 (2001).

[16] 18 CFR § 385.214(d) (2001).

[17] 18 CFR § 385.213(a)(2) (2001).

Transco historically designed, constructed and operated its systems in order to perform a bundled service—purchasing and aggregating gas supplies and transporting' those supplies for sale to local distribution companies at the city gate. However, since the restructuring of the natural gas industry, Transco provides an array of unbundled services, such as transportation, storage, and fully unbundled sales services, to a wide variety of customers. In its principal role as a transporter, Transco no longer requires its extensive gathering facilities to provide gas sales. Moreover, most of Transco's sales are made at its pooling points, not at the wellhead. The abandonment will permit Transco to eliminate unnecessary expenses associated with these facilities and WGP will make more efficient use of the acquired facilities. Accordingly, for the reasons discussed below, we find that the public convenience and necessity permit Transco to abandon by transfer to WGP the portion of the Central Louisiana System found to be gathering, as discussed below.

B. Opposition to the Abandonment

Various parties oppose the abandonment arguing that the facilities have and continue to perform a transmission function, and that any transfer of facilities to WGP will result in a lack of competitive alternatives and allow WGP to wield substantial market power over shippers.

1. Impact on Existing Shippers

Indicated Shippers, an ad hoc group of companies interested in gas transported on Transco's system,[18] object that the proposal would undo decades of Commission jurisdiction

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[18] The members of the Indicated Shippers include: Amerada Hess Corporation, Amoco Production Co., BP Energy Co., Burlington Resources Oil & Gas Co. L.P., Chevron U.S.A. Inc., Conoco Inc., Exxon Mobil Corp., Occidental Energy Marketing, Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc. Each of the members has also intervened separately.

over the entirety of Transco's system and may permit the Transco corporate family to impose rates in excess of those previously deemed just and reasonable. Indicated Shippers object to Transco transferring a portion of its integrated system, including facilities currently functionalized as transmission, to an unregulated affiliate. Indicated Shippers also dispute the contention that maintaining these facilities as transmission hinders Transco's ability to compete with exempt gatherers, pointing out that Transco may discount its rates to compete and that Transco has failed to identify any gatherer against which it cannot effectively compete. Indicated Shippers contends that if the systems remain regulated, Transco will not be able to collect rates in excess of its maximum tariff rates. Indicated Shippers further states that in the absence of competitive alternatives, the abandonment of the Central Louisiana facilities will allow WGP to wield substantial market power permitting them to exact monopoly rents from shippers.

Con Edison requests that the Commission require that Transco present evidence as to the market value of the subject facilities and, if that value exceeds the net book value, require Transco to offset the excess against extraordinary costs underlying its proposed general rate increase in Docket No. RP01-245-000. New York argues similarly, questioning whether the transfer price is less than the fair market value of the facilities. New York contends that if pipelines are allowed to transfer valuable facilities to affiliates at prices which may be less than market value, such pipelines have waived their right to seek stranded cost recovery for any other facilities which may turn out to be uneconomic. It states that this issue should be reviewed in the context of Transco's pending rate case in Docket No. RP01-245-000. New York requests that the Commission defer consideration of this proceeding and direct Transco to file a cost and revenue impact study to be

considered in the pending rate case. Alternatively, New York requests that a technical conference be convened to discuss these issues.

Municipal Group and Richmond request that Transco's rates be adjusted under Transco's pending NGA section 4 proceeding in Docket No. RP01-245-000 to reflect the removal of the costs of the Central Louisiana facilities. If the spindown is approved after September 1, 2001, the effective date of the pending section 4 proceeding, they request that Transco be required to file a limited section 4 rate case to reflect fully the rate effects of the spindown. North Carolina argues similarly, stating that if the Commission approves the spindown proposal, regardless of the date, it should require Transco to remove these costs from its rate base prior to a final order in the pending rate case.

Producer Coalition, an ad hoc group of natural gas producers, who market gas on Transco's system,[19] suggests that the Commission require Transco/WGP to disclose the proposed rates and conditions of future service on the Central Louisiana facilities, prior to the issuance of a Commission order on the spindown. Producer Coalition disputes Transco/WGP's contention that WGP is negotiating with its customers and offering a package of services. It contends that WGP has failed to make any disclosure of the rates and terms and conditions it intends to offer. Without this advance information, Producer Coalition states that the shippers are left to assume the worst—that WGP in fact intends to exploit its market power.

Indicated Shippers also question the appropriateness of Transco abandoning numerous receipt points from the FT

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[19] This group consists of Dominion Exploration & Production, Inc., Devon Energy Corp., Forest Oil Corp., The Houston Exploration Co., Newfield Exploration Co., Ocean Energy, Inc., and TotalFinaElf E&P U.S.A., Inc.

agreements. They state that the abandonment would also delete these receipt points from those available to IT-feeder shippers that ship gas under Transco's tariff to FT shippers. Indicated Shippers states that, contrary to Transco's assertion, the public interest is not served by the unilateral termination or degradation of existing firm services or by the abandonment of IT-feeder facilities to a non-jurisdictional affiliate.

Superior/Walter offer similar arguments opposing the spin-down. They allege that the proposal is nothing more than a vehicle to significantly increase the production area rates that marketers and producers must pay over the regulated IT-feeder rates currently being charged. They also believe that the primary function of the facilities at issue remains transmission.

a. Transco and WGP Response

Transco/WGP believe that the Indicated Shippers' protest should be denied, because it is largely a collateral attack on the Commission's court-approved policy[20] favoring the spin-down of gathering facilities, which Transco/WGP contend is consistent with the Commission's unbundling policies and other pro- competitive objectives. They also contend that the Indicated Shippers' functional analysis of the facilities unduly relies on non-physical factors, such as prior certificate and rate classification, system integration, and effects on competition, ownership and business purpose, which are of little or no relevance to the jurisdictional status of facilities under NGA section 1(b). Transco/WGP respond to Superior/Walter in the same manner.

As to the issues of competitive factors and market power, Transco/WGP state that the Commission has found them

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[20] Citing *Conoco Inc. v. FERC*, 90 F.3rd 536 (D.C. Cir. 1996), *cert, denied*, 519 U.S. 1142 (1997) (Conoco); *Pacific Gas and Electric Co. v. FERC*, 106 F.3rd 1190 (5th Cir. 1997).

irrelevant in determining the function of OCS facilities.[21] Transco/WGP find it disingenuous that some of the protestors consistently oppose spindowns by interstate pipelines, while at the same time some of them enjoy non-NGA regulated status for their own OCS gathering pipelines. Transco/WGP also point out that, even in the absence of continued NGA regulation of these facilities, Indicated Shippers still will be protected by the open access and nondiscrimination provisions of the OCSLA.

As to the contention that the spindown will result in a degradation of existing transportation service because various receipt points will be deleted from certain of Transco's FT agreements, Transco/WGP state that WGP plans to negotiate post-spindown agreements with all shippers and it will operate the facilities in an open and nondiscriminatory manner.

Transco states that it is not, as suggested by New York, attempting to spindown only the most economically attractive facilities. Transco contends that its objective has been and continues to be the comprehensive spindown of Transco's gathering facilities originally proposed by Transco and WGP in Docket Nos. CP96-206-000 and CP96-207-000. However, Transco states that the Commission dismissed those applications,[22] without prejudice to Transco's and WGP's filing more limited discrete spindowns, which Transco avers it has done. Transco/WGP state that they would welcome the opportunity to implement a comprehensive spindown of all Transco facilities that perform a gathering function, as originally proposed in Docket Nos. CP96-206-000 and CP96-207-000. As to the requests that the Commission require Transco to remove from its rates the cost of the facilities to be transferred, Transco states that if the Commission approves

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[21] Citing *Louisiana Gas Co.*, 67 FERC ¶ 61,255 at 61,851 (1994).

[22] *See* n. 1, *supra*.

the spindown prior to the effective date of its next effective rate case, it will make a rate filing to reflect the spindown as approved.

Finally, Transco/WGP state that Con Ed's request (to offset the difference between the net book value and the market value of the subject facilities) should be denied as the Commission allows the transfer of facilities at net book value.

b. Commission Response

Transco, like many interstate pipelines, found after restructuring its system consistent with Order No. 636, and moving from a bundled, merchant function to an unbundled, transportation function, that it no longer needed all of its existing system facilities. The Commission routinely grants requests to abandon facilities that we determine were used to gather gas supplies in support of the merchant gas sales function a pipeline no longer offers.[23] The fact that these facilities were previously certificated is not determinative of whether the present or future public convenience and necessity allow their abandonment. Further, the fact that a certificate exists for a given facility may not be determinative of its true jurisdictional status. As we stated in CNG Transmission Corporation, "until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined."[24] Here, we find it reasonable for Transco to seek to abandon the proposed facilities via spindown to its gathering affiliate because this is the proper forum to apply the primary function test to these facilities. We also find that the record in this proceeding is adequate for us to determine the proper function of the facilities.

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[23] See *Trunkline Gas Co.*, 95 FERC ¶ 61,337 (2001); *Natural Gas Pipeline Co. of America*, 94 FERC ¶ 61,186 (2001); and *Northern Natural Gas Co.*, 93 FERC ¶ 61,101 (2000).

[24] 67 FERC ¶ 61,330 at 62,177 (1994).

The protestors argue that existing shippers will be adversely affected by the spindown because there will be no competition and they will have to deal with an unregulated entity for the same service that they currently receive from Transco. The transfer of gathering facilities and services by interstate pipelines to nonjurisdictional entities is consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry.[25] As we have noted, section 1(b) of the NGA exempts gathering from the jurisdiction of this Commission. Thus, if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion to withhold such authorization. Here, consistent with the discussion below, we are finding that a portion of Central Louisiana facilities perform a gathering function. The remainder of the facilities perform a transmission function.

Nor is the issue of competition relevant to whether or not the Commission will' regulate an affiliated gatherer's rates or terms and conditions of service after it acquires abandoned facilities. The Commission has no authority under the NGA to regulate a gatherer's rates or its terms and conditions of service.[26] We find that the separate rate structure shippers will encounter after the spindown is consistent with the unbundling principles expressed in Order No. 636, where the Commission noted that shippers are expected to pay a separate rate for each separate service they receive. The shippers, in effect, have been on notice since February 21, 1996, when Transco filed its initial application in Docket No. CP96-206-000, that it proposed to abandon, among others, the facilities at issue here. This interval of over five years has

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[25] See *Northern Natural Gas Company*, 93 FERC ¶ 61,101 at 61,273 (2000).

[26] *Conoco*, 90 F.3d at 544-53.

provided an extended transition period for these shippers to contemplate their service options in the event the abandonment of these facilities was approved.[27]

In addition, the facilities at issue here are located on the OCS and will become subject to the OCSLA upon approval of the spindown. Under the OCSLA, WGP is prevented from discriminating against any shipper that seeks access to the facilities it will acquire in this proceeding from Transco. Assuming all existing shippers using the central Louisiana facilities want to continue moving their gas via the same path, both they and WGP will have a vested interest in reaching mutually agreed upon terms and conditions for continuation of the existing service. Since the OCSLA guarantees shippers open and nondiscriminatory access to offshore facilities, WGP cannot discriminate between shippers and has incentive (fully utilized facilities) to negotiate fairly with Transco's existing shippers.

Further, we note that on April 20, 2000, in Order No. 639, the Commission issued a final rule promulgating regulations under the OCSLA to ensure that natural gas is transported on an open and nondiscriminatory basis through facilities located on the OCS. The regulations require OCS gas transportation service providers to make information available regarding their customers and conditions of service.[28] WGP will be

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[27] See *NorAm Gas Transmission Co.*, 78 FERC ¶ 61,265 at 62,128 (1997). The Commission previously conditioned the spindown or spinoff of gathering facilities on the acquiring entity's continuing to provide comparable service to existing shippers for a two-year term. This two-year time was intended to serve as a transitional period, during which shippers subject to NGA-regulated transportation service agreements could consider their options as NGA-exempt gathering customers. In Conoco, however, the court ruled that the Commission lacked jurisdiction to impose this particular condition on abandonments of facilities found to be exempt from the Commission's jurisdiction. 90 F.3d at 544-53.

[28] *See* Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer

subject to these regulations.[29] Further, Transco already has in its tariff standards of conduct for gathering affiliates that prevent it from acting in a discriminatory manner by guarding against the risk of affiliate abuse and ensuring an arms length relationship between it and WGP.[30]

In Transco/WGP's answer, WGP states that it intends to negotiate post- spindown agreements with all shippers. In the event that any shipper believes that either Transco or WGP have violated its statutory requirements under the OCSLA, or that the terms of service WGP offers any existing shipper prove inconsistent with the OCSLA's requirements, the shipper can file a complaint and the Commission will investigate any such complaint in a timely manner.[31] Since we will continue to employ our NGA authority to ensure that Transco's jurisdictional rates remain just and reasonable, we find WGP's commitment, along with the protections provided by the OCSLA, will act to ensure adequate access and service to existing customers.

As to the requests that Transco adjust its rates, we will require Transco, consistent with Section 154.303(c)(2) of our regulations, to remove the cost of the facilities abandoned and transferred here from the rates it proposes to charge in its current rate proceeding in Docket No. RP01-245-000.

Continental Shelf, Order No. 639, 65 Fed. Reg. 20354 (April 17, 2000), FERC Stats, and Regs. ¶ 31,514, at 31,539 (April 10, 2000), Order No. 639-A, 65 Fed. Reg. 47294 (Aug. 2, 2000), FERC Stats, and Regs. 31,103 (July 26, 2000).

[29] Section 330.2 of the Commission's regulations requires that WGP report the terms under which it provides service to its shippers. 18 CFR § 330.2 (2001).

[30] *See* Third Revised Sheet No. 350, Third Revised Volume No. 1 to Transco's FERC Gas Tariff.

[31] 18 CFR § 385.206 (2001).

Moreover, we disagree with Con Ed's and New York's objections to Transco's proposed transfer of facilities to WGP at net book value. Transco will not realize any gain from the transfer of its facilities which it could share with its ratepayers. Therefore, Transco's ratepayers will be in the same position after transfer of the facilities as before the transfer. We find that ratepayers will not be harmed, and that the transfer of the facilities at net book value is appropriate.[32] Thus, we will not defer consideration of this proceeding, as requested by New York.

Finally, we find the record before us contains sufficient information and data to make a reasoned decision on the merits. Accordingly, New York's request for a technical conference is denied

2. Changed Position on Facilities

Indicated Shippers argue that Transco has previously argued that its offshore and onshore facilities were transmission facilities because they constitute a unitary, interdependent and integrated pipeline system that have always been regulated. They contend that Transco has not justified its change in functionalization of the facilities from transmission to gathering. The Producer Coalition and Superior/Walter argue similarly.

a. Transco/WGP Response

Transco/WGP contend that the factors these protestors rely on (*i.e.*, prior certificate and rate status, integrated nature of facilities, ownership by an interstate pipeline, reliance on past regulation, and the presence or absence of competition) are of little or no relevance to the jurisdictional status of the facilities.

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[32] See *Northern Natural Gas Company and Enron Gathering Company*, 73 FERC ¶ 61,223 at 61,626 (1995).

b. Commission Response

We find no cause to disallow Transco the right to claim its facilities perform a gathering function, when in the past it may have advocated the facilities function as transmission. As noted above, the Commission has consistently found that a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the facilities for purposes of jurisdiction under NGA section l(b). Historically, many pipelines have functionalized facilities one way for rate purposes, then sought to have such facilities functionalized another way for purposes of certificate and jurisdiction. How pipelines historically functionalized their facilities for rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities.[33] Here, we are finding that portions of the Central Louisiana facilities do, in fact, perform a gathering function and are therefore exempt from our jurisdiction under NGA section l(b). However, as we stated above, those facilities will remain subject to the OCSLA's requirements for open and non-discriminatory access for all shippers.

C. Jurisdictional Status of Facilities

WGP asks us to declare that the Central Louisiana System would be non- jurisdictional gathering facilities if operated as described in its petition.[34]

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[33] See *Southern Natural Gas Company, et. al.*, 79 FERC ¶ 61,076 at 61,379-80 (1997); CNG Transmission Corp., 67 FERC ¶ 61,257 at 62,177 (1994).

[34] Transco's proposed spindown is being undertaken at the same time as Transco seeks in Docket No. RP92-137-050 to implement a two-part, production area, straight fixed variable rate proposal, and firm-to-gathering rate design. The Commission addressed these issues in its May 31, 2001 order in that proceeding. See *Transcontinental Gas Pipe Line Corp.*, 95 FERC ¶ 61,322 (2001).

Under NGA section 1 (b), the Commission has jurisdiction to regulate the transportation and sale for resale of natural gas in interstate commerce and any natural gas company engaged in that transportation or sale. Section l(b) states, however, that the Commission's jurisdiction does not extend to facilities used for the production or gathering of natural gas. To determine whether particular facilities perform primarily a gathering or transmission function, the Commission considers the criteria articulated in Farmland Industries. Inc., (Farmland)[35] as modified by Amerada Hess Corporation (Amerada Hessl[36] and Sea Robin.[37]

In Farmland, the Commission enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the location of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures of the facility.[38] The Commission does not consider any single factor to be determinative and recognizes that all factors do not necessarily apply in all situations.

Over the past decade, the Commission found it necessary to modify the primary function test to recognize the unique physical characteristics of offshore pipeline facilities built on the OCS. In Amerada Hess, the Commission acknowledged

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[35] 23 FERC ¶ 61,063 (1983).

[36] 52 FERC ¶ 61,268 (1990).

[37] *Supra* note 2.

[38] In addition to the Farmland factors, the Commission considers these non-physical criteria in its jurisdictional analysis: (1) the purpose, location, and operation of the facility, (2) the general business activity of the owner of the facility, and (3) whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act.

that technological advances make it possible to drill for gas at increasing offshore depths. Thus, following Amerada Hess, the Commission has applied a "sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters in correlation to the distance from shore and the water depth of the offshore production area."[39] This "modified primary function" test recognizes that a relatively long pipeline on the OCS may be consistent with a primary function of gathering or production where onshore it would not.

In order to further clarify the jurisdictional status of offshore facilities, the Commission issued an OCS Policy Statement[40] which added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more. The Policy Statement creates a presumption that these deep water facilities are gathering facilities up to the point or points of interconnection with the interstate pipeline grid. Aside from this presumption concerning deep water facilities, the Policy Statement left the application of the primary function test unchanged.

More recently, as a result of the court's opinion in Sea Robin v. FERC,[41] the Commission has reconsidered the primary function test in view of the unique challenges presented in the attempt to apply Farmland factors to offshore facilities. The court vacated and remanded Commission orders that found under the primary function test, that Sea Robin's OCS pipeline facilities were jurisdictional transmission facilities.

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[39] *Amerada Hess*, 52 FERC at 61,988.

[40] Gas Pipeline Facilities and Services on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 (1996), *order dismissing reh'g*, 75 FERC ¶ 61,291(1996).

[41] 127 F3d 385.

In *Sea Robin v. FERC*, the court found, among other things, that the Commission had given too much weight to the length and diameter of the overall system. The court acknowledged that non-physical considerations (such as business purpose, ownership and prior certification of the facilities) are relevant in the analysis but said that they are secondary to physical considerations which must be used in determining where gathering ends and transportation begins.[42] On remand, the court advised the Commission to review its primary function test. The court also advised that the Commission could consider suggestions made by Sea Robin that portions of its system were predominantly involved in gathering while other portions were transmission.

In the order on remand in Sea Robin II, the Commission took the court's suggested approach and reconsidered the application of the primary function test to the OCS facilities. Among other things, the Commission concluded that the "behind-the-plant" factor was not necessarily determinative when the primary function test is applied to offshore facilities. Rather, the Commission decided to assess the physical configuration of a pipeline system to determine if there is a central location where gas is aggregated for further transportation to shore. The Commission concluded that it would view such a location as being the offshore equivalent of the onshore "central-point-in-the-field" factor of the primary function test.[43]

In sum, the reformulated primary function test (1) adopts an additional analytical element applicable to systems that contain a centralized aggregation point, (2) adjusts the weight afforded to the "behind-the-plant" criterion so that the loca-

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[42] 127 F3d at 370-71.

[43] 87 FERC at 62,431.

tion of the processing plants is not necessarily determinative and can be outweighed by other factors, and (3) focuses primarily on physical factors.

1. Protests

Indicated Shippers protest WGP's request for a declaratory order staring that in the OCS Policy Statement, the Commission rejected calls by Transco and other companies that all OCS facilities be found to be gathering. Indicated Shippers argue that the Policy Statement provides that new facilities located in water depths of 200 meters or more will be presumed to be gathering, but that the Commission would not withdraw its jurisdiction, absent changed circumstances, for existing facilities in shallower waters. Indicated Shippers submit that the facilities at issue are located in waters shallower than 200 meters and that Transco has not demonstrated that the primary function of the facilities has changed. They contend that the overwhelming majority of the facilities subject to the spindown are not characteristic of gathering facilities. Likewise, Superior/Walter argue that Transco has not shown that the facilities are, in fact, gathering rather than transmission.

Indicated Shippers and the Producer Coalition argue that contrary to WGP's claim, the primary function of the facilities should be based on considerations relevant to offshore facilities, not onshore facilities. They state that the location of a portion of the facilities onshore does not alter the fact that most of the gas transported on the system is produced from offshore wells. Indicated Shippers state that the onshore location of the processing plants utilized to process offshore gas does not support a finding that all facilities upstream of the plant constitute gathering.

Indicated Shippers and the Producer Coalition also dispute Transco's reliance on Sea Robin II as the primary support for their request to refunctionalize the Central Louisiana

facilities. In particular, Indicated Shippers object to the new "central aggregation point" test added to the OCS criteria and point out that certain parties have sought court review of the Sea Robin II orders setting forth the new test. Regardless of that challenge, Indicated Shippers argue that such test cannot be applied to the central Louisiana facilities because it is very common for the collection or aggregation of gas to be accomplished throughout the entire transmission system. Indicated Shippers argue that the central Louisiana facilities do not have a central aggregation point. In addition, Indicated Shippers state that the main spine of the system consists of large diameter, looped lines that perform a transmission, not gathering function. They also note that numerous wells attached to the system are located some distance from any of the Transco facilities and are attached by smaller gathering lines. They submit that the gathering function is applicable to these facilities, not the Transco facilities at issue.

Indicated Shippers also submit that a central factor in determining the primary function of the facilities at issue is the overall business purpose of the system. They submit that the OCS transmission facilities are part of Transco's integrated pipeline system. Superior/Walter share these concerns.

Producer Coalition primarily objects to the services using the facilities no longer being subject to rate caps if the Commission determines the facilities to be gathering. Producer Coalition suggests that the Commission take no action on the spindown until after the United States Court of Appeals for the D.C. Circuit decides the Sea Robin case. Like Indicated Shippers, Producer Coalition submits that, rather than the reformulated modified primary function test announced in Sea Robin II, the Commission should adopt the "feeder line test" described in the legislative history to OCSLA section 5(f)(2). Under the feeder line test, gathering extends from the wellhead to the point where the gas is first collected and treated to remove free water in preparation for

injection into a pipeline for transportation to shore. Producer Coalition believes that since the facilities listed in the application and petition appear to be downstream of the platform separators and treating facilities, they are not gathering facilities.

Producer Coalition also believes that, even if the Commission's Sea Robin II order is sustained, the Transco facilities are not used for a gathering function. It states that the jurisdictional status of the facilities must be examined in light of the reformulated primary function test. It further argues that because a portion of the facilities are onshore and located behind a processing plant does not qualify the facilities for gathering. Producer Coalition stresses that the Commission has clearly stated that this is the case for almost all offshore facilities and is not determinative of their primary function. In addition, it states that the Commission has made clear that the primary function of offshore facilities has not been reduced to simply identifying the first fork or interconnection in a line leading from shore.[44] It stresses the integrated nature of Transco's system and indicates that the Commission takes the aggregation point on a system into account along with other factors of the primary function test.

Indicated Shippers and the Producer Coalition argue that the size and scope of the Central Louisiana facilities are highly indicative of a transmission function. Indicated Shippers and the Producer Coalition contend that Transco's proposal is flawed, because it contains more than 380 miles of pipeline, including roughly 280 miles of 12-inch or larger pipeline, that perform strictly a transmission, not gathering function.

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[44] See *Dauphin Island Gathering System*, 93 FERC ¶ 61,198 at 61,654 (2000).

a. Transco/WGP Response

TranscoAVGP contend that the Indicated Shippers' functional analysis of the facilities unduly relies on non-physical factors, such as prior certificate and rate classification, system integration, and effects on competition, ownership and business ' purpose, which are of little or no relevance to the jurisdictional status of facilities under NGA section 1 (b). TranscoAVGP also point out that, even if the absence of continued NGA regulation of these facilities, Indicated Shippers still will be protected by the open access and nondiscrimination provisions of the OCSLA.

TranscoAVGP disagree with Indicated Shippers, the Producer Coalition, and SuperiorAValter that the "integrated" nature of the Central Louisiana facilities dictates a transmission function. TranscoAVGP argue that natural gas gathering systems are necessarily integrated with transmission systems, just as gathering systems are integrated with gas production facilities, so that there can be a coordinated movement of gas from production fields to end-use markets. They contend that such integration does not characterized these systems solely as transmission, gathering or production for jurisdictional purposes.

Contrary to Indicated Shippers' contention that the Sea Robin II decision is too broad an interpretation of the NGA section l(b) exemption, WGP states that it showed in that case that the Commission's reformulated primary function test results in too limited a view of the exemption. Nevertheless, TranscoAVGP state that they relied on Sea Robin II to guide the scope of the instant spindown, while reserving their right to challenge any findings in appropriate proceedings. TranscoAVGP submit that Sea Robin II provides compelling support for non-jurisdictional status for the subject spindown, in mat the legs of the Central Louisiana facilities are comparable to the upstream legs of the Sea Robin system which were ruled nonjurisdictional.

TranscoAVGP oppose the Producer Coalitions' request to delay the processing of the spindown until after the D.C. Circuit acts on the Sea Robin appeal. TranscoAVGP complain that, because of previous delays in processing its spindown proceedings, they have already been placed at an unfair disadvantage, vis-a-vis other competitors for OCS gathering services. Transco/WGP also reject Producer Coalition's request for the Commission to adopt a limited interpretation of gathering that they claim would result in the Commission's exercise of NGA jurisdiction over virtually all OCS pipelines (all lines downstream of initial platform separators). Transco/WGP contend that the "feeder line" test was specifically rejected by the Commission as legally deficient in Sea Robin II.[45]

Transco/WGP also object to the Producer Coalition's request to require the disclosure of post-spindown rates and terms and conditions to be offered to shippers. They submit that the Commission has no authority to regulate the post-spindown rates and terms and conditions offered by gathering companies, even those affiliated with a jurisdictional gathering company. Also, they indicate that the Commission has recognized that the OCSLA does not authorize NGA-type rate regulation of OCS pipeline companies.[46]

b. Commission Response

We conclude, for the reasons discussed below, that an assessment of the primary function factors, as modified with respect to offshore facilities, demonstrates that only a portion of the Central Louisiana facilities at issue here are performing primarily a gathering function and will continue to be used

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[45] 92 FERC at 61,294.

[46] Citing Order No. 639-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,103, at 31,686 (2000).

in this capacity following their abandonment by sale to WGP. The remainder of the facilities perform a transmission function.

The facilities consist of both onshore and offshore portions of the total system, which are located behind the onshore, nonjurisdictional Cow Island Processing Plant.[47] The onshore gathering facilities radiate outward from the plant in a web-like configuration to collect gas production The facilities extend into the shallow waters offshore Louisiana via looped trunklines. Numerous gathering laterals collect gas from various offshore production locations and deliver it to the looped trunklines for transportation onshore to the plant.

Specifically, the onshore portion of the facilities consist of slightly more than 180 miles of web-like lateral lines that collect gas from numerous wells in numerous producing fields. The facilities are relatively small, with lines ranging from 2 to 18-inches in diameter. The longest segment is a 26 mile, 18-inch line that interconnects with numerous other laterals on its way to the Cow Island plant. The lines are sized to gather gas from the various producing fields and collect gas from wells located throughout the facilities for movement to the plant. These pipe sizes are consistent with a gathering function.

The offshore facilities, which form a spine and lateral-type configuration, center around looped 16 and 20-inch tninklines (the spine) that travel from Vermilion Block 67, Offshore Louisiana, approximately 42 miles downstream to the processing plant. Once these lines reach shore, they are joined by another loop line, this one 24 inches in diameter, that transports the gas collected upstream to the plant. The primary function of these looped lines is to transport to the Cow Island plant gas gathered from offshore production areas

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[47] WGP the Cow Island plant, which is owned by El Paso Field Services Co.

and delivered into the trunks either directly or indirectly. These spines display the physical characteristics typical of interstate pipeline facilities and function no differently than any other jurisdictional pipeline. It is the various lateral lines connected along the length of these looped lines that perform a gathering function.

We find that the looped transmission lines begin at the Vermilion Block 67 Platforms and traverse the downstream shallow offshore waters to landfall and then on to the Cow Island plant. These looped lines form the spine of the offshore portion of the Central Louisiana facilities. The remaining 6 to 24- inch offshore lateral lines connect at various locations into the spine and serve to collect gas from the surrounding production areas. However, it is at the Vermilion Block 67 platforms that the primary function of the facilities changes. Upstream from this junction, all the facilities perform a gathering function. Downstream from this junction, the spine performs a transmission function, while, as mentioned, the remaining laterals perform a gathering function. This junction serves as the central point of aggregation for the facilities, where all the gas gathered upstream is delivered to a single point for transportation onshore. We find that this junction functions as an aggregation point that may be interpreted as indicating a demarcation of gathering and transmission functions.

The various lateral lines connected to the looped spine are short and small in diameter compared to the facilities found to be gathering in Sea Robin II, These line sizes are common for offshore gathering facilities. These lines are sized appropriately to gather the large volume of gas that is collected from the various wells located throughout the offshore production areas in which the facilities are located. In fact, wells are located all along the length of the lines, up to the Vermilion Block 67 juncture. While not all of the wells may be directly connected to these lines, that does not disqualify

the lines from a finding of gathering. It merely reflects the nature of offshore production, where gas from numerous wells is aggregated at production platforms for movement onshore. In addition, the fact that certain of the lines are located downstream from the central aggregation point does not detract from their primary function of gathering. Like the upstream legs, these lines also serve to gather gas from production located in their vicinity.

There is no compression located along the any of the Central Louisiana facilities, which means that the system operating pressures of between 750 and 1,000 psig are a function of the wellhead pressures and/or producer-owned compression. The wellhead pressures and/or producer compression act to push the gas through the facilities, which is typical of a gathering function,[48] unlike pipeline compression, which is typical of a transmission function. The operating pressures are consistent with those of other onshore and offshore facilities found to be gathering.[49]

In addition, the processing facilities are located on the transmission facilities onshore. We have previously discussed the impracticality of locating processing plants offshore[50] and concluded that, in the offshore context, the absence of processing plants is of little value in assessing the primary function of facilities.

On balance, we find that the 16, 20 and 24-inch looped spine lines from the Cow Island plant upstream to the Vermilion Block 67 platforms perform a transmission function and, thus, remain subject to our NGA oversight. The remainder of the facilities, both onshore and offshore, per-

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[48] *See* Tarpon Transmission Co., 78 FERC ¶ 61,025 (1992).

[49] *See Florida Gas Transmission Co.*, 91 FERC ¶ 62,164 (2000) and *Trunkline Gas Co.*, 95 FERC ¶ 61,337 (2001).

[50] *See, e.g., EP Operating v. FERC*, 876 F.2d 45, 49 (5th Cir. 1989).

form a gathering function and, accordingly, are exempt from our NGA regulatory oversight.

Protestors want the Commission to delay action here pending the outcome of the court proceedings in Sea Robin II and suggest that we adopt the "feeder line test" rather than the primary function test to determine gathering. First, we will not hold this proceeding in abeyance pending the outcome of the Sea Robin II court case. The Commission currently has guidance from the court on how to proceed in distinguishing gathering from transmission on the OCS and we use that guidance in our determination here. Second, we have already addressed the "feeder line" issue in the Sea Robin 11 order. There, the Commission rejected arguments that, as a result of enactment of the OCSLA, we must adopt a "feeder line" definition of gathering.[51] For the same reasons, we reach the same conclusions here.

Indicated Shippers argue that our OCS Policy Statement established the expectation that, absent changed circumstances, existing offshore facilities are to retain their jurisdictional or nonjurisdictional status under the NGA. We disagree. The OCS Policy Statement is not intended to stand for permanently fixing the present jurisdictional status of offshore facilities. The OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. We find Transco's restructuring and the adaptation of our primary function test in the Sea Robin II order on remand qualify as legitimate reasons to revisit the jurisdictional status of Transco's existing offshore facilities.

Indicated Shippers contend that a central factor in determining the primary function of the facilities at issue is the overall business purpose of the system. While we find it useful to look at the nature of the company that owns and operates facilities proposed to be spundown, that is but one of

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[51] *See Sea Robin II, 92 FERC ¶ 61,072* at 61,294 (2000).

the factors to be considered. Here, Transco is an interstate gas transporter that has gone through restructuring to segregate its previously bundled services. We find that Transco's primary business is that of transportation. However, we also find that the nature of Transco's business, in and of itself, does not disqualify certain of the facilities at issue from a determination of gathering. The Commission, in its primary function analysis, does not consider any one factor to be determinative and recognizes that all factors do not necessarily apply in all situations.

Transco's application reflects that Columbia Gulf Transmission Company, CNG Transmission Corporation (now Dominion Transmission, Inc.), Florida Gas Transmission Company, and Sea Robin are joint owners of certain segments of the Central Louisiana facilities. To the extent that these parties co-own with Transco facilities we have found to be nonjurisdictional, and currently functionalize their interests in the facilities as transmission, these parties will need to refunctionalize such facilities as gathering for rate and accounting purposes in their next NGA section 4 rate proceeding.[52]

C. Environmental

Finally, we conclude that approval of the proposed abandonment will not constitute a major federal action significantly affecting the quality of the environment.

At a hearing held on August 31, 2001, the Commission on its own morion received and made a part of the record in these proceedings all evidence submitted, including the applications and petitions and exhibits supporting the sought authorizations, and after consideration of the record.

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[52] See *CNG Transmission Corp.*, 67 FERC ¶ (61,330, at 62,178 (1994); Southern Natural Gas Co., 79 FERC ¶ 61,076 at 61,380 (1997); and Natural Gas Pipeline Co. of Amer., 95 FERC ¶ 61,317 (2001).

The Commission orders:

(A) In Docket No. CP01-368-000, Transco is granted permission and approval under NGA section 7(b) to abandon by sale to WGP, its interests in the Central Louisiana facilities, as described more fully in this order.

(B) In Docket No. CP01-369-000, upon acquisition by WGP, the Central Louisiana facilities, except for the 16, 20, and 24-inch looped lines between the Vermilion Block 67 platforms and the Cow Island plant, will be deemed gathering facilities exempt from the Commission's jurisdiction under NGA section 1 (b).

(C) Within 15 days after WGP acquires the Central Louisiana facilities deemed gathering, WGP shall file an initial OCSLA Report with respect to such facilities, in accordance with the reporting requirements of Commission Order No. 639, and thereafter to file quarterly OCSLA Report updates, as needed, in accordance with the provisions of Order No. 639.

(D) In Docket No. CP01-369-000, the looped lines between Vermilion Block 67 and the Cow Island plant are and will be transmission facilities subject to the Commission's NGA jurisdiction.

(E) Transco shall notify the Commission within 10 days of the date of abandonment of the facilities described above.

(F) Transco is authorized to abandon its X-rate schedule transportation services as well as the affected receipt points under its Part 284 agreements previously described, provided they are services rendered through or are facilities that are part of those found to be gathering and will be abandoned to WGP.

(G) Consistent with Section 154.303(c)(2) of our regulations, Transco shall adjust its rates to remove the cost of the Central Louisiana facilities found to be gathering in its current rate proceeding in Docket No. RP01-245-000.

(H) The protests in this proceeding are denied.

(I) The late motions to intervene are granted.

(J) The request for a technical conference is denied.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.
Acting Secretary

APPENDIX

Interventions and Protests in Docket No. CPQ1-368-000

Amerada Hess Corporation
Amoco Production Company and BP Energy Company
Anadarko Petroleum Corporation
Atlanta Gas Light Company and Virginia Natural Gas Company
Burlington Resources Oil & Gas Company L.P.
Chevron U.S.A. Inc.
City of Richmond. Virginia*
Consolidated Edison Company of New York**
Delmarva Power & Light Company
Dynegy Marketing and Trade
Enron North America Corp.
Exxon Mobil Corporation
Indicated Shippers **
KeySpan Delivery Companies
National Fuel Gas Distribution Corporation
Occidental Energy Marketing, Inc.
PECO Energy Company
Philadelphia Gas Works
Phillips Petroleum Company and Phillips Gas Marketing Company
Piedmont Natural Gas Company, Inc.
Producer Coalition** ***
Public Service Commission of the State of New York
Public Service Company of North Carolina***
Shell Offshore Inc.
Southern Companies, Inc.
Southern Natural Gas Company

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* Comments

** Protests the application.

*** Intervention out-of-time.

Superior Natural Gas Corporation and Walter Oil & Gas Corporation ** ***
Texaco Natural Gas Inc.
Transco Municipal Group and the Municipal Gas Authority of Georgia ***
United Cities Gas Company, a division of Atmos Energy Corporation
Washington Gas Light Company
Williams Gas Processing-Gulf Coast Company, L.P.

APPENDIX

Interventions and Protests in Docket No. CPO1-369-000

Amerada Hess Corporation
Amoco Production Company and BP Energy Company
Anadarko Petroleum Corporation
Atlanta Gas Light Company and Virginia Natural Gas Company
Burlington Resources Oil & Gas Company L.P.
City of Richmond, Virginia
Chevron U.S.A. Inc.
Conoco Inc.
Dynegy Marketing and Trade
Enron North America Corp.
Exxon Mobil Corporation
Indicated Shippers [FNa1]
KeySpan Delivery Companies
Occidental Energy Marketing, Inc.
Phillips Petroleum Company and Phillips Gas Marketing Company [FNaa1]
Piedmont Natural Gas Company, Inc
Producer Coalition [FNa1]
Public Service Commission of the State of New York
Shell Offshore Inc.
Southern Companies, Inc.

Southern Natural Gas Company
Superior Natural Gas Corporation and Walter Oil & Gas Corporation [FNa1] [FNaa1]
Texaco Natural Gas Inc.
Transco Municipal Group and the Municipal Gas Authority of Georgia [FNaaa1]
Transcontinental Gas Pipe Line Corporation
United Cities Gas Company, a division of Atmos Energy Corporation

FNa1. Protests the application.

FNaa1. Intervention out-of-time.

FNaaa1. Comments

APPENDIX I

FEDERAL ENERGY REGULATORY COMMISSION
Commission Opinions, Orders and Notices

[Filed December 19, 2001]

Docket No. CP01-368-001
Docket No. RP01-245-004
Docket No. CP01-369-001

Transcontinental Gas Pipe Line Corporation
Williams Gas Processing-Gulf Coast Company, L.P.

ORDER ON REHEARING

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Mead Brownell.

September 28, 2001, Indicated Shippers[1] filed a Request for Rehearing of the Commission's Order Authorizing Abandonment and Determining Jurisdictional Status of Facilities issued in these dockets on August 31, 2001 (August 31 Order).[2] On October 1, 2001, Transcontinental Gas Pipe Line Corporation (Transco) and Williams Gas Processing-Gulf Coast Company, L.P. (WGP) filed a joint Request for Rehearing and Limited Stay of the August 31 Order. Also on

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[1] Indicated Shippers is an ad hoc group of companies having an interest in gas transported on the Transco system. In this case, the members of Indicated Shippers are: Amerada Hess Corporation, Amoco Production Company, BP Energy Company, Burlington Resources Oil & Gas Company, L.P., Chevron U.S.A., Inc., Exxon Mobil Corporation, Occidental Energy Marketing, Inc., Shell Offshore Inc., and Texaco Natural Gas, Inc.

[2] *Transcontinental Gas Pipe Line Corporation, et al.*, 96 FERC ¶ 61, 246 (2001) (August 31Order).

October 1, 2001, the Producer Coalition[3] filed a Request for Rehearing of the August 31 Order. On October 16, 2001, Key Span Delivery Companies, Atlanta Gas Light Company and Virginia Natural Gas Company, Consolidated Edison Company of New York, Inc., Delmarva Power & Light Company, Philadelphia Gas Works, Public Service Electric and Gas Company and Washington Gas Light Company (KeySpan) submitted a response[4] in partial opposition to the requests of Transco for limited stay and rehearing. Keyspan incorporated by reference its September 10, 2001 response in Docket Nos. CP01-32-000, *et al.*, and CP01- 103-000, *et al.* The August 31 Order approved a request by Transco to abandon certain facilities located offshore and onshore Louisiana (Central Louisiana facilities) by transfer to its gathering affiliate, WGP. The August 31 Order also granted, in part, WGP's request that the Commission declare that the facilities it proposes to acquire from Transco will be, upon abandonment by transfer to WGP, gathering facilities and services, exempt from the Commission's jurisdiction under the NGA. The Commission determined that facilities upstream from Vermilion Block 67 perform a gathering function and facilities downstream from this junction perform

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[3] The Producer Coalition is an ad hoc group of natural gas producers, made up of Devon Energy Corporation, Dominion Exploration & Production, Inc., Forest Oil Corporation, The Houston Exploration Company, Newfield Exploration Company, and Ocean Energy, Inc. These companies have significant investment in oil and gas exploration and production projects in the Gulf of Mexico and are shippers and marketers of gas on numerous OCS pipelines.

[4] Under the Commission's Rules of Practice and Procedure, there is nothing which forecloses KeySpan from responding to a request for stay. Under Rule 713(d), parties are normally precluded from responding to a request for rehearing. 18 CFR § 713(d) (2001). However, the Commission has determined that it will accept answers to rehearing in order to ensure that all arguments are considered.

a transmission function.[5] The August 31 Order also directed Transco to adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000. This order denies or grants the requests for rehearing, as discussed below.[6] As noted in the August 31 Order, abandonment serves the public interest by permitting Transco to eliminate unnecessary expenses associated with facilities no longer needed to provide certificated services and enables WGP to make efficient use of these same facilities. Granting rehearing on the rate issue serves the public interest by assuring that the jurisdictional rates will continue to be just and reasonable while also preserving the integrity of the Commission's ratemaking policies.

I. Background

The August 31 Order permitted Transco to abandon, by transfer to its affiliate WGP, approximately 380 miles of 2-inch to 24-inch pipeline located in the East Cameron and Vermilion Areas, offshore Louisiana, and in Acadia, Jefferson Davis, and Vermilion Parishes, Louisiana (Central Louisiana facilities). In response to WGP's request, the August 31 Order sought to determine whether the facilities at issue were used primarily to transport gas, and thereby were subject to our jurisdiction under the NGA, or were used primarily to produce or gather gas, and thereby were exempt from our NGA jurisdiction.[7]

To determine the primary function of particular facilities, the Commission applies the criteria articulated in Farmland Industries, Inc., (Farmland).[8] In Farmland, the Commission

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[5] 96 FERC at 61,976.

[6] As the Commission is granting the request for rehearing on the rate issue which is the subject of the motion for stay, the motion is moot.

[7] Section 1(b) of the NGA states that "[t]he provisions of this Act . . . shall not apply to . . . the production or gathering of natural gas."

[8] 23 FERC ¶ 61,063 (1983).

enumerated several physical and geographic factors to be considered in determining the primary function of a facility, including: (1) the facility's length and diameter, (2) the extension of the facility beyond the central point in the producing field, (3) the facility's geographic configuration, (4) the placement of compressors and processing plants, (5) the location of wells along all or part of the facility, and (6) operating pressures. In addition to these physical and geographic criteria, the Commission also considers the purpose, location, and operation of the facility, the general business activity of the owner of the facility, and whether the jurisdictional determination is consistent with the objectives of the NGA and Natural Gas Policy Act. We do not consider any single factor to be determinative and recognize that all factors do not necessarily apply in all situations.

The Commission has modified this primary function test for facilities located offshore. In 1990, in Amerada Hess Corporation (Amerada Hess),[9] the Commission observed that as a result of "recent advances in engineering and available technology, offshore drilling operations continue to move further offshore and further from existing interstate pipeline interconnections." [10] Given the increasingly remote location of such offshore facilities, the Commission found that offshore pipelines used to produce or gather gas may be larger and longer than onshore pipelines that perform the same function. Accordingly, the primary function test was modified for application to offshore facilities, by applying "a sliding scale which will allow the use of gathering pipelines of increasing lengths and diameters." [11]

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[9] 52 FERC ¶ 61,268 (1990).

[10] *Id.*, at 61,988.

[11] *Id.*

In Sea Robin Pipeline Company (Sea Robin),[12] the Commission reformulated the primary function test with respect to offshore facilities by (1) adopting an additional analytical element applicable to systems that contain a centralized aggregation point; (2) adjusting the weight to be afforded the "behind-the-plant" criterion so that the location of processing plants is not necessarily determinative and can be outweighed by other factors, and; (3) focusing primarily on physical factors.

The August 31 Order, in considering the primary function of the subject facilities, applied the Farmland test as modified in Amerada Hess and as reformulated in Sea Robin. The Commission found that: (1) the Vermilion Block 67 junction serves as the central point of aggregation; (2) the length and diameter of the numerous pipelines are consistent with offshore gathering facilities; (3) the wellhead pressures are typical of a gathering function; (4) the absence of processing plants is of little value in assessing the primary function of facilities. Accordingly, the Commission concluded that the "primary function" of the facilities located upstream from Vermilion Block 67 perform a gathering function and will continue to be used in this capacity following their abandonment by sale to WGP, but that the remainder of the facilities perform a transmission function.

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[12] 71 FERC ¶ 61,351 (1995), order on reh'g, 75 FERC ¶ 61,332 (1996), remanded sub nom. Sea Robin v. FERC, 127 F. 3d 365 (Fifth Cir. 1997), reh'g denied (February 2, 1998), order on remand, 87 FERC ¶ 61,384 (1999), order denying reh'g, 92 FERC ¶ 61,072 (2000), order denying stay, 92 FERC ¶ 61,217 (2000).

II. Requests for rehearing

A. Whether the abandonment of the North High Island and West Cameron facilities is in the public interest.

1. Interests of shippers and the public

Indicated Shippers state that the Commission's finding that it has no discretion to withhold authorization for the transfer of facilities, when it believes that the primary function of the facilities is gathering, is not correct.[13] Indicated Shippers state that Section 7 of the NGA makes clear that the Commission's first duty is to protect the interests of shippers and the public, rather than to accommodate Transco's and WGP's corporate objectives.

Indicated Shippers point out that the abandonment would remove certain receipt points from those available to IT-feeder shippers that ship under Transco's tariff to FT shippers. Indicated Shippers state that the public interest is not served by the unilateral termination or degradation of existing firm services or by the abandonment of IT-feeder facilities to an un-regulated affiliate. Indicated Shippers state that producers and other shippers have relied for decades on the Commission's regulation of the entirety of Transco's offshore pipeline system. Indicated Shippers state that the public interest is not served by undermining these expectations by reversing decades of prior regulatory practice. Further, Indicated Shippers state that dividing this operationally integrated system into separate regulated and unregulated parts is not in the public interest because it could undermine the Commission's open access policies.

Indicated Shippers state that Transco's abandonment application is grounded on the theory that, because Transco no longer provides bundled sales service, Transco's gathering services must be freed from the Commission's regulations in

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[13] 96 FERC at 61,970.

order to be able to compete with exempt gatherers. Indicated Shippers state that Transco has presented no evidence to support a finding that it has been unable to compete with non-NGA-regulated gathering companies. Indicated Shippers state that Transco is not concerned over whether it will be able to effectively compete in the marketplace with exempt gathers. Rather, Indicated Shippers state that Transco's real concern is over whether it will be able to take advantage of its existing control of the market in order to exact monopoly rents from shippers.

Commission response

We reaffirm our conclusion that the abandonment is required and in the public interest. Where facilities are found to be used primarily in production or gathering, section 1(b) of the NGA directs that they be excluded from our NGA regulatory jurisdiction. As stated in the August 31 Order, the abandonment is consistent with unbundling policies of Order No. 636, and should, in the long run, promote competition.[14] Under the Outer Continental Shelf lands Act (OCSLA),[15] WGP will be prevented from discriminating against any shipper that seeks access to these facilities. Further, as noted in the August 31 Order, WGP will be subject to our OCSLA regulations which require that WGP report the terms under which it provides service to its shippers.[16] The Commission will continue to employ its NGA authority to ensure that Transco's jurisdictional rates remain just and reasonable. And, Transco's existing tariff standards prevent it from acting in a discriminatory manner.[17] WGP has agreed to continue to serve Transco's existing customers following the facilities'

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[14] 96 FERC at 61,970.

[15] 43 U.S.C. 1301-1356.

[16] 96 FERC at 61, 972.

[17] 96 FERC at 61,971.

transfer. This should avoid any abrupt disruption to Transco's customers' expectations.

Independent entities engaged in different aspects of gas development, production, gathering, transporting, and delivery to end users are able to negotiate and rely on contractual capacity and scheduling commitments to guarantee the efficient movement of gas. Because we expect WGP, like all other offshore gatherers, will prove able to enter into service agreements with Transco, and any other transmission pipelines it may rely on, to take timely deliveries of its anticipated gas volumes, we see no need for Transco to retain ownership of its upstream gathering facilities to ensure the orderly flow of gas into its downstream transmission mainlines.

2. Effect on cost of moving gas to shore

Indicated Shippers complain that the August 31 Order transforms a single IT-feeder rate into rate-stacked charges for WGP's gathering and Transco's transmission services. Indicated Shippers state that without the constraint of rate regulation under the NGA, WGP will be able to charge shippers whatever the market will bear. Indicated Shippers state that there are no interconnections with other pipelines at the point at which the Commission finds that gathering ends and transmission begins, so shippers using the gathering facilities have no choice but to utilize Transco's remaining downstream IT-feeder transmission facilities to access Transco's mainline. Indicated Shippers state that it is not enough to say that the procedural safeguards of the OCSLA will adequately protect shippers from the market power of Transco and WGP.

Commission response

Prior to abandonment, shippers are effectively paying Transco a transportation rate that includes gathering. That gathering service will be unbundled and provided by WGP. WGP's acquisition of Transco's facilities will necessarily

subject shippers on these facilities to both a gathering and a transportation charge, where before such shippers were subject to a single Transco transportation rate. The Commission acknowledges that after the transfer of the facilities, shippers may pay a higher combined gathering fee and transportation charge to move gas between specific receipt and delivery points than the rate they now pay for bundled gathering and transportation service between the same points. However, this is neither inequitable nor an unwarranted rate stacking. As discussed in Order No. 636, it is appropriate to segregate and charge separate rates for separate services, rather than continue to compel shippers to pay a bundled charge for several distinct services.

The Commission will continue to employ its NGA authority to ensure that Transco's rates remain just and reasonable. Regarding WGP's facilities, although no State agency has authority, these facilities remain subject to federal oversight under the OCSLA. Though the OCSLA does not provide for rate regulation equivalent to that of the NGA, shippers are assured open and nondiscriminatory access to WGP's facilities. Onshore, and in state waters offshore, shippers on NGA-exempt facilities can appeal to state authorities to monitor WGP's operations. In the event a shipper believes either Transco or WGP violates its statutory obligations under the OCSLA, the Commission encourages that shipper to submit a complaint to the Commission describing the alleged violation.[18]

B. Challenges to the primary function test

1. Should the Commission apply the OCSLA "feeder line" test instead.

Producer Coalition states that because of the close relationship between the OCSLA, the principal federal statute

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[18] 18 CFR § 385.206 (2001).

governing the OCS, and the NGA, the Commission should accord significant weight to legislative intent in formulating the jurisdictional test for OCS pipelines. Producer Coalition states that Congress has addressed the nature of gathering operations on the OCS in the 1978 OCSLA Amendments.[19] Producer Coalition states that, throughout the consideration of OCS pipeline issues, Congress equated "gathering" lines with "feeder" lines and concluded that such lines end where gas is "first separated, dehydrated or otherwise processed" on an OCS platform.[20] Producer Coalition states that the Commission erred in failing to accord the definition of gathering from the OCSLA Amendments of 1978 significant weight in its jurisdictional test. Producer Coalition states that the offshore Central Louisiana facilities are properly classified as jurisdictional transportation systems under the "feeder line" test.

Commission response

The Commission does not consider Congress' discussions of proposals to modify the OCSLA as guidance for jurisdictional distinctions under the NGA. The separate statutes, although complementary, have distinctly different scopes. The OCSLA applies to the full range of gas exploration, development, production, gathering, and transportation activities.[21] This is a broader regulatory sweep than the NGA which explicitly exempts facilities used for production, gathering, local distribution, and certain in-state transportation. It would be inappropriate to rely on definitions and terms of art indigenous to one statute to interpret and enforce the other. Accordingly, the Commission rejects the Producer Coalition's effort to use legislative history associated with the

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[19] 43 U.S.C. 1301-1356.

[20] 43 U.S.C. § 1334(f)(2).

[21] 43 U.S.C. 1331(q).

1978 amendment to the OCSLA as a foundation to argue for a new NGA primary function test.

2. Must Transco demonstrate changed circumstances

The August 31 Order stated that "a pipeline's functionalization of facilities for rate and accounting purposes does not determine the function of the facilities for purposes of jurisdiction under section 1(b) of the NGA. How pipelines historically functionalized their facilities for rate and accounting purposes does not prevent the Commission from applying the primary function test to determine the current jurisdictional status of the facilities." [22] In addition, the Commission also stated that it found "no cause to disallow Transco the right to claim its facilities perform a gathering function, when in the past it may have advocated the facilities function as transmission." [23]

Indicated Shippers state that while historical functionalization alone may not be determinative, the prior treatment of the facilities by both Transco and the Commission should be given presumptive effect in the absence of a showing of changed circumstances. Indicated Shippers state that given Transco's prior arguments to the Commission that the facilities were transmission, Transco should be estopped from now arguing that they are gathering.

Indicated Shippers state that Transco has failed to show a change in circumstance that would demonstrate that the subject facilities are now gathering. Indicated Shippers state that the Commission offers no reasoned explanation why restructuring served to change the function of Transco's facilities, particularly given that the Commission's prior findings that the facilities are properly treated as transmission

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[22] 96 FERC at 61,972, citing *Southern Natural Gas Company, et. al.*, 79 FERC ¶ 61,076 at 61,379 (1997).

[23] *Id.*

was made in conjunction with Transco's restructuring. Indicated Shippers state that Transco itself previously argued that restructuring served to reinforce the fact that all of its pipeline facilities provide a transmission function.

Indicated Shippers state that the Commission's decision here to change the pre-existing functionalization of certified facilities in the shallow waters of the OCS is in direct conflict with the OCS Policy Statement that indicates that the Commission would preserve the existing status of interstate pipeline facilities in the shallow water of the OCS.

Commission response

The OCS Policy Statement was explicit that "existing interstate pipelines and gathering facilities would retain their status barring some change in circumstances."[24] Nevertheless, the OCS Policy Statement must be read in light of the subsequent opinion in *Sea Robin v. FERC*, which determined that nonphysical factors such as ownership and prior certification are considerations secondary to physical factors.[25] In any event, the OCS Policy Statement anticipates that facilities may be reclassified in response to changing circumstances. The August 31 Order accepted Transco's claim that reclassification is merited as a response to Order No. 636. After Order No. 636, many interstate pipeline companies found portions of their system's facilities were no longer required in order to provide certain certificated services. Where we found such facilities were employed to gather gas supplies needed to ensure a pipeline's capability to

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[24] Gas Pipeline Facilities and Services on the Outer Continental Shelf - Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, 74 FERC ¶ 61,222 at 61,757 (1996), order dismissing reh'g, 75 FERC ¶ 61,291 (1996) (OCS Policy Statement).

[25] 123 F.3d at 371.

fulfill merchant sales obligations, a function that is no longer offered, we permitted pipelines to abandon such facilities.[26]

Second, Order No. 636 aside, a pipeline company can submit an abandonment application at any time, and the Commission will consider the reasons presented for requesting a review of the company's facilities' classification. We have acknowledged that the facilities were constructed, owned, and operated by Transco, historically an NGA-regulated interstate transportation provider. Nevertheless, we found that changed circumstances, principally Transco's reorganization in response to Order No. 636, tempered this indicator that the facilities were dedicated to interstate transportation.

3. Does the Central point of aggregation factor create a single factor test

As stated earlier, in Sea Robin, the Commission reformulated the modified primary function test adding a new "centralized aggregation point" factor for determining the jurisdiction of facilities on the OCS.

In Sea Robin the Commission found that gathering ends and transmission begins at the point where two or more segments of an OCS pipeline join for the last time and a single line moves natural gas towards shore.[27] The Commission refers to this as the "centralized collection point," or "central aggregation point," which is the point at which the gas collection/aggregation process on an OCS interstate pipeline ends.

Indicated Shippers complain that the Commission's analysis in Sea Robin is inherently flawed. Indicated Shippers state that this new test permits the Commission to find a point

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[26] 96 FERC at 61,971.

[27] Sea Robin, 87 FERC at 62,430-431.

on a pipeline where the largest diameter pipeline on the system begins or where all upstream lines converge, and to designate that point as the demarcation point where gathering ends and transportation begins. Indicated Shippers state that this test would essentially eliminate any evaluation of the physical, geographical, and operational factors traditionally considered by the Commission in distinguishing gathering from transportation. Indicated Shippers state that in place of the primary function test, Sea Robin essentially establishes the very type of bright line test for which the Commission was admonished by the Fifth Circuit.[28] Indicated Shippers state that under this test the Commission would look for the central point on a pipeline system without reference to the nature of the upstream facilities and their relationships with producers' wells and other facilities.

Producer Coalition makes a related argument that because three of the factors contained in the modified primary function test produce three mutually exclusive jurisdictional results, the Commission, by necessity, must select one factor to predominate in order to reach a jurisdictional determination. Producer Coalition state that if the Commission gives principal emphasis to the "behind the plant" location of facilities, all OCS facilities will be declared non-jurisdictional, because all processing plants downstream of OCS pipelines are located onshore.[29] Alternatively, Producer Coalition state that if the Commission gives principal emphasis to length and diameter of the pipeline, most major OCS systems will be found jurisdictional. Third, Producer

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[28] Citing, *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989).

[29] Because of this fact, Producer Coalition state that the Commission has effectively disregarded the behind-the-plant factor in determining the jurisdictional status of OCS facilities. *Sea Robin II*, 87 FERC 62,428; *Enron Gulf Coast Gathering*, 95 FERC ¶ 61,318; *Trunkline Gas Company, et al.*, 95 FERC ¶ 61,337 (2001); and *Seahawk Transmission Co.*, 95 FERC ¶ 61,342 (2001).

Coalition state that if the Commission relies on the "central point of aggregation factor," the great bulk of OCS pipelines will be found non-jurisdictional except for the lines that run from the last major intersection offshore to the onshore terminus of a system. Producer Coalition state that while the other factors contained in the modified primary function test, *i.e.*, (i) location of wells along all or part of the facility; (ii) geographic configuration; (iii) line pressure; and even (iv) the nature of the company that owns and operates the facilities-can be interpreted in a manner to support each of the above jurisdictional results, the results themselves cannot be reconciled with each other. Producer Coalition reason that use of the modified primary function test necessarily involves the selection of one dominant factor, which is determinative of the outcome. Producer Coalition state that that factor, however, becomes the "bright line" standard, which runs afoul of the Fifth Circuit's conception of reasoned decision-making.

Commission response

The above line of arguments largely represents a collateral attack on the Commission's reasoning in Sea Robin and is rejected for that reason. In addition, Indicated Shippers and Producer Coalition misread the August 31 Order. For both the Sea Robin and Transco systems, all relevant criteria of the Farmland test, as modified with respect to offshore facilities, were afforded appropriate consideration. In this case, not all factors pointed to the same primary function—a result commonly encountered in applying our multi-factor test—thereby compelling the Commission to weigh each factor to balance the conflict presented. In the August 31 Order, in addition to the location of points of aggregation, the Commission found that the configuration of the facilities, the lack of compression, and the size and scope of the pipelines also demonstrated a gathering function.[30] The Commission

[30] 96 FERC at 61,459.

found that the absence of processing plants was of little value in guiding the determination on the primary function of the facilities.[31] Although the Commission did identify a single, central point of aggregation, the primary function finding did not rest solely on this feature (or on any other single factor) of the system. The claim that under our primary function test, the Commission is compelled to select a single factor and let it dominate to determine jurisdiction, is rejected.

C. Challenges to the application of the primary function test

1. Configuration

Indicated Shippers state that even if the Sea Robin "central point of aggregation" analysis is lawful, the Commission's selection of the Vermilion Block 67 platform as the demarcation points is inappropriate. Indicated Shippers states that Map 6W-B reflects the many smaller pipeline facilities forming "Y" configurations along the lateral lines and going out to the actual wells. Indicated Shippers state that the Commission should not ignore these upstream facilities, which aggregate gas and provide the gathering function on the system. Indicated Shippers state that the facili ties downstream of these smaller lines should be treated as transmission.

Indicated Shippers state that the location of wells, for the most part, appear to be remote from Transco's facilities. Indicated Shippers state that production is brought to Transco in smaller gathering lines. Accordingly Indicated Shippers state that, the gathering function is provided by other parties, whose facilities bring gas to Transco's trunk lines. For example, Indicated Shippers state that the map of the Central Louisiana facilities shows numerous wells, purportedly served by Transco's facilities, that are located off Transco's

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[31] *Id.*

lines.[32] Although Indicated Shippers agree with the Commission's finding that this alone would not disqualify the lines from a finding of gathering this is yet another piece of evidence that supports a finding that the subject facilities are transmission and not gathering.

Commission response

In Sea Robin, the Commission took note of the court's observation that, while the task in a case may be difficult, the Commission must squarely address the fact that the demarcation point between gathering and transmission may be located at a point internal to the overall system.[33] The Commission explained that the most logical demarcation point may be the "coincidence of several smaller lines at a centralized location where the gas carried is delivered into a single, larger-diameter line for further delivery to market."[34] A primary function review of the traits of all potential legs and trunks is required.

The Commission found that the Vermilion Block 67 platforms serves as the central point of aggregation for the facilities, where all the gas gathered upstream is delivered to a single point for transportation onshore. Although the Vermilion Block 67 junction does not exhibit as strong an indication of a marked physical change in facilities as was the case in Sea Robin,[35] the Commission found that it functions as an aggregation point that may be interpreted as indicating a demarcation of gathering and transmission functions. The

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[32] *See Abandonment Application*, Exhibit Z (maps 6W-A and B).

[33] 92 FERC ¶ 61,072 at 61,290.

[34] 92 FERC ¶ 61,072 at 61,290.

[35] In Sea Robin, the central point of aggregation was a manned off-shore platform at which two smaller lines merged into a single larger line, significant compression facilities were located on the platform, and the platform was situated as a point geographically central to the Sea Robin system.

configuration of this point implied a transition from gathering to transmission, a finding that was accepted only after applying the multi-factor methodology to the rest of Transco's facilities.

2. Size

The onshore portion of the facilities consist of slightly more than 180 miles of web-like lateral lines that collect gas from numerous wells in numerous producing fields. The facilities are relatively small, with lines ranging from 2 to 18-inches in diameter. The longest segment is a 26 mile, 18-inch line that interconnects with numerous other laterals on its way to the Cow Island plant. The offshore facilities, which form a spine and lateral-type configuration, center around looped 16 and 20-inch trunklines (the spine).

Indicated Shippers state that although *EP Operating Co. v. FERC*,[36] stands for the proposition that the Commission should not improperly overemphasize the length of the pipeline in its primary function analysis, length is still an important factor to consider. Indicated Shippers state that out of the 200 miles of pipeline at issue, over 100 miles of the pipeline consist of pipe with a diameter equal to or greater than 12 inches, including some 24-inch pipe that extends from the trunk line westward to Vermilion Block 22. Indicated Shippers state that Seahawk Shoreline System,[37] illustrates that 12-24 inch pipeline facilities can qualify as transmission facilities. Indicated Shippers complain that in the August 31 Order, the Commission failed to take into account the overall length of the pipeline in its determination that the facilities are gathering.

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[36] 876 F.2d 46 (5th Cir. 1989).

[37] 93 FERC ¶ 61,097 (2000) order denying reh'g, 95 FERC ¶ 61,342 (2000).

Commission response

The Commission has adopted no bright line test regarding the size of jurisdictional offshore facilities. Although size generally correlates with function, large offshore facilities need not be summarily disqualified from gathering status if the other characteristics of the facilities are indicative of a gathering function.[38] Facilities as large as typical transmission lines may nevertheless be found to be gathering when other primary function factors demonstrate characteristics consistent with gathering.[39] Likewise following review of the Farmland factors, we have also determined that systems smaller than these perform a transmission function.[40]

In this case, the Commission applied the several factors of the primary function test. Not all factors were found to be relevant or uniform, and certain factors exhibited more value or weight than others. The subject lines' large diameters, a usual indicator of a transmission function, was outweighed by other characteristics denoting a gathering function. The Commission affirms the prior determination that on balance the factors indicate that the facilities to be abandoned perform primarily a nonjurisdictional gathering function.

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[38] *See Amerada Hess*, 52 FERC P61, 268 (1990) (discussion of and response to *EP Operating v. FERC*, 876 F.2d 45 (5th Cir. 1989). *See also Viosca Knoll*, (finding a relatively long, large line gathering).

[39] Offshore, a 28-inch diameter line has been found to be gathering. *Exxon Corporation*, 45 FERC P61, 436 (1988). However, that diameter was found in 9.5, 7.9, and 6.1 -mile segments of a 36.7-mile system that was producer owned, carried only sour gas, included no compression, and performed production as well as gathering.

[40] *See, e.g., Louisiana Intrastate Gas Corporation*, 69 FERC ¶ 61,022 (1994) (a system composed of 1.34 miles of 4-inch diameter pipe and 21.94 miles of 16-inch diameter pipe that serves to carry gas from OCS production areas to shore).

3. Pressure

Indicated Shippers argue that the pressure ranges of the facilities, between 750 and 1000 psig, also indicate a transmission function. Indicated Shippers state that these pressure ranges reflect neither the very high nor low operating pressures frequently seen in gathering lines. Indicated Shippers state that the absence of compression does not undermine this view: it simply reflects that compression was unnecessary, and sheds no light on whether the facilities are gathering or transmission.

Commission response

There is no compression located along any of the Central Louisiana facilities, which means that the systems operating pressures are a function of the wellhead pressures. The wellhead pressures act to push the gas through the facilities, which is typical of a gathering function, unlike compression, which is typical of a transmission function. While these pressures would indicate a transportation function onshore, they must be viewed, here, in the offshore context. These pressures are consistent with the nature of offshore production and comparable to operating pressures of other offshore facilities found to be gathering.[41] Accordingly, the Commission affirms the prior determination that the pressure factors indicate that the facilities to be abandoned located upstream from Vermilion Block 67, perform primarily a nonjurisdictional gathering function.

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[41] *See, e.g., Northern Natural Gas Company*, 93 FERC ¶ 61,101 (2000) (offshore facilities operating at pressures between 1,050 and 1,200 psig found gathering) and *Tarpon Transmission Company*, 78 FERC ¶ 61,278 (1997) (offshore facilities operating at pressures between 1,100 and 1,250 psig found gathering).

4. Shallow water factor

Indicated Shippers point out that the OCS Policy Statement [42] provides that new facilities located in water depths of 200 meters or greater will be presumed to be gathering.[43] Indicated Shippers state that the Commission failed to give any weight to the fact that the various Central Louisiana lines upstream of Vermilion Block 67 and the downstream laterals that are connected to the looped transmission do not extend to the deep waters of the OCS.

Commission response

As noted in the August 31 Order, the OCS Policy Statement added a new factor to the primary function test concerning facilities that are designed to collect gas produced in water depths of 200 meters or more.[44] The OCS Policy Statement creates a presumption that these deep water facilities are gathering facilities up to the point or points of interconnection with the interstate pipeline grid. There is no corollary rebuttable presumption that facilities located in shallow water are transmission. Rather, the Commission considers a facility's location in shallow water as one among several criteria in assessing the primary function. While almost all NGA-regulated pipe is located in shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and gathering facilities. Accordingly, a particular facility's placement in shallow water, standing alone, is a poor predictor of that facility's primary function (in contrast, in deep water, almost all

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[42] *Gas Pipeline Facilities and Services on the Outer Continental Shelf-Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, 74 FERC ¶ 61,222 (1996), order dismissing reh'g, 75 FERC ¶ 61,291 (1996) (Policy Statement).

[43] *Id.* at 61,757.

[44] 96 FERC at 61,973.

facilities are engaged in production or gathering). The shallow water location must be viewed in the context of a facility's other characteristics in order to reach any meaningful assessment of its primary function. In this case, the shallow water location of the subject facilities was not as substantial a factor as the facilities' other characteristics.

5. Integrated Pipeline System

Indicated Shippers believe that the nature of Transco's integrated pipeline system provides strong evidence in support that the primary function of Transco's entire Central Louisiana system continues to be transmission. Indicated Shippers state that there is no reasoned basis to conclude that the primary function of one portion of an integrated system is gathering, and the other is transmission.

Commission response

In Sea Robin the Commission rejected the position that the Commission should consider an entire pipeline system gathering if the "integrated" nature of the system, as a whole, is designed to transport gas from production areas to onshore locations. The Commission explained that such a finding would violate the Commission's responsibility to draw jurisdictional lines, even when the end of gathering is not easily located, as for example, when it occurs at a point internal to an overall system.[45] For the same reason, we reject the contention that the integrated nature of Transco's system precludes us from finding that a portion of the system is gathering.

6. Historical certification and business purpose

Indicated Shippers argue that the Commission erred in its conclusion that the historical certification of Transco's facilities is not relevant to the current primary function of the

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[45] 92 FERC ¶ 61,072 at 61,290.

facilities and in failing to give due weight to the business purpose of the subject facilities. Indicated Shippers are in agreement with the Commission in that the "business purpose" of the subject facilities is only one factor to consider in determining the primary function of the facilities. However, Indicated Shippers argue that because the business purpose of the pipeline provides strong evidence of a pipeline's functionalization, it should be considered a central factor. Indicated Shippers argue that where the owner of pipeline facilities is in the business of transportation for hire, and has historically operated the pipeline as an integrated interstate pipeline system, the primary function of the pipeline is most likely transmission.

Commission response

In the past, when a pipeline applied for a certificate to construct facilities, the Commission did not inquire into the pipeline's prospective use of the facilities before issuing the certificate. Consequently, many facilities that actually may perform a gathering function originally were constructed under NGA section 7 certificates. Therefore, until the Commission actually scrutinizes the facilities under the primary function test, the actual jurisdictional status of the facilities cannot be definitively determined.[46]

The offshore facilities at issue here were installed under NGA certificate authority and have continued to be functionalized by Transco as transmission for many years. Nonetheless, in making jurisdictional determinations on the OCS, and indeed, onshore as well, the physical characteristics of the particular pipeline systems are the more significant factors, and each determination must be made on the basis of its own specific fact situation.[47] Here, such non-physical

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[46] *See, CNG Transmission Corporation*, 67 FERC P61, 330, at 62,177 (1994).

[47] *Sea Robin*, 127 F.3d 365 at 371.

aspects are not compelling enough to overcome the overwhelming physical evidence

D. Challenge to the rate adjustment

In Docket Nos. CP01-368-001 and RP01-245-004, Transco seeks rehearing of the requirement that it adjust its rates to remove the cost of the facilities to be abandoned from its current rate proceeding in Docket No. RP01-245-000.[48] Pending the Commission's action on rehearing, Transco also requests that the Commission grant a limited stay of the August 31 Order's rate adjustment requirement. As discussed below, the request for rehearing on this issue is granted. Therefore, the motion for stay is moot.

Transco states that having now received the Commission's Order granting abandonment and transfer, Transco and WGP must make the modifications necessary to permit operation of these facilities on a stand-alone basis, and must negotiate contracts to govern post-spin down services on these facilities. Transco states that for a variety of reasons, it does not believe that such transfer will close until well into 2002, at the earliest.

Transco states that the August 31 Order contains no findings under either NGA Sections 4 or 5 that the subject facilities will not be in service through the test period in Docket No. RP01-245-000, or that Transco's rates to be effective September 1, 2001, will be unjust or reasonable. Transco states that Section 5(a) requires such findings before the Commission may lawfully adjust a pipeline's rates.[49] Transco states that to require Transco to remove the cost of these facilities from jurisdictional rates while such facilities continue to render jurisdictional service would be unlawful

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[48] 96 FERC at 61,978, Ordering paragraph G.

[49] 15 U.S.C. 717d(a). Transco cites *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993).

under these NGA sections, which require that a pipeline be afforded an opportunity to earn a fair return on its investment in jurisdictional facilities and to recoup its costs in rendering jurisdictional service.[50]

KeySpan, *et al.*, argue that the timing of the transfer is a matter within the control of the contracting parties and Transco's customers should not be required to continue to pay for facilities that are not necessary to provide their jurisdictional services simply because the transfer has not occurred as expeditiously as Transco had planned.

Commission response

In its application in Docket No. CP01-368-000, Transco proposed to transfer the subject facilities to WGP effective on the last business day of the calendar month following the calendar month of the issuance of [the August 31 Order], or at a mutually agreeable date thereafter. Thus, the transfer was expected to occur as early as September 28, 2001. However, the transfer did not take place at that time. The test period in Transco's current general rate proceeding in Docket No. RP01-245-000 expired on August 31, 2001, and the proposed rates became effective on September 1, 2001.[51] The subject

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[50] Transco cites *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[51] On March 1, 2001, in Docket No. RP01-245-000, Transco filed revised tariff sheets to reflect a general NGA section 4 rate increase. The Commission exercised its discretion to accept and suspend the rates to take effect on September 1, 2001, subject to conditions and subject to refund and the outcome of a hearing. *Transcontinental Gas Pipe Line Corporation*, 94 FERC ¶ 61,360 (2001). On August 31, 2001, in Docket No. RP01-245-003, Transco filed a motion to place the suspended tariff sheets into effect on September 1, 2001. Among other things, Transco stated that it had eliminated the costs associated with facilities not in service as of August 31, 2001, but had not reflected any adjustments in the compliance rates for the subject facilities for which abandonment was granted. By order issued September 27, 2001, the Commission accepted the revised tariff sheets to be effective September 1, 2001, subject to

facilities continue to be owned by Transco, and are being operated under color of a certificate issued by the Commission. The Commission's regulations only require removal of the costs of facilities that will not be in service as of the end of the test period.[52] Hence, the Commission's regulations and ratemaking policies did not require that Transco remove the cost of those facilities and costs from the rates that went into effect on September 1, 2001, subject to refund. Accordingly, rehearing is granted. The order in Docket No. RP01-245-005, issued concurrently with the instant order, discusses the effect of the refunctionalization of the subject facilities to gathering on Transco's rates.

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refund, the outcome of the hearing established in Docket No. RP01-245-000, and the certificate proceedings in Docket Nos. CP01-34-000, CP01-103-000 and CP01-368-000. *Transcontinental Gas Pipe Line Corporation*, 96 FERC ¶ 61,345 (2001) (September 27 Order). The Commission also directed Transco to file revised tariff sheets, within 15 days of the date of issuance of that order, reflecting the removal of the costs of the facilities abandoned in the certificate proceedings.

On October 9, 2001, in Docket No. RP01-245-005, Transco filed a Request For Clarification Or, In The Alternative, For Rehearing, of the September 27 Order (October 9 Request). Transco also requested a limited stay that sought an extension of time within which to comply with the September 27 Order. The motion states that because Transco's books and records would have to be reconstructed in order to calculate the costs required by the Commission's Order, compliance is not possible within the 15-day deadline. On November 6, 2001, an extension of time was granted until 30 days after the Commission acts on Transco's October 9 Request. The Commission order in Docket No. RP01-245-005 is being issued concurrently with the instant order.

[52] Section 154.303(c)(2) of the Commission's regulations states:

> When a pipeline files a motion to place the rates into effect, the filing must be revised to exclude the costs associated with any facilities that will not be in service as of the end of the test period . . . At the end of the test period, the pipeline must remove from its rates costs associated with any facility that is not in service . . .

Nonetheless, the Commission's finding in the August 31 Order that Transco must remove the costs of the facilities that it will abandon from its prospective rates was grounded on the principal that just and reasonable jurisdictional rates cannot be based on the costs of facilities not owned by the pipeline, not in service, and not needed to provide service to jurisdictional customers. Thus, it would seem unjust and unreasonable for Transco to continue to charge rates designed to afford Transco the opportunity to recover the cost of and earn a fair return on an investment in the subject facilities at such time that it no longer owns them and no longer uses them to provide jurisdictional service. Accordingly, we shall direct Transco to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned facilities, 30 days prior to the effective date of the transfer of the subject facilities.

III. Request for clarification

Indicated Shippers ask that the point at which gathering ends and transmission begins be better identified than in the July 25 Order. Indicated Shippers state that simply identifying a particular platform is not sufficient because a more specific identification becomes critical for new interconnections to the platform. Indicated Shippers state that if Transco deems such new interconnect to be upstream of the point of demarcation between gathering and transmission, the pipeline and its affiliate could argue that a gathering fee must be paid for a very short haul of gas from one point on the platform to another. In order to avoid this sort of rate stacking, Indicated Shippers request that the Commission clarify that all of the facilities at the platform at which gathering ends are to be treated as transmission; and, only facilities upstream of the platform should be gathering. In this way Indicated Shippers state that, there will be no question

that new interconnects at the platform will not bear a gathering charge for short hauls on the platform.

Commission response

The Commission clarifies that facilities upstream of the jurisdictional demarcation platform have been found to be gathering, and facilities downstream have been found to be transmission. However, the Commission denies the request to clarify that all of the facilities at the jurisdictional demarcation platform are to be treated as transmission. An OCS platform may be constructed to serve many functions, such as an aggregation point for numerous lines, and/or to provide separation, dehydration, and other production and transmission services. Basically, facilities on the platform involved with bringing gas to the platform are gathering and facilities involved in sending gas toward shore are transmission. Facilities that separate or dehydrate are also performing production and gathering functions. Although unusual in offshore situations, compression facilities would most likely be involved in transmission. New interconnections to the platform should be functionalized accordingly.

The Commission orders:

(A) The requests for rehearing are granted or denied as discussed in this order.

(B) Pursuant to section 5 of the Natural Gas Act, Transco is directed to show cause, within 30 days from the date of issuance of this order, why it should not be required to file revised tariff sheets and supporting workpapers containing replacement rates reflecting the removal of all costs associated with the abandoned facilities, 30 days prior to the effective date of the transfer of the subject facilities.

(C) Within 15 days after WGP acquires the subject facilities deemed gathering, WGP must file an OCSLA Reporting Form and the conditions of service for each shipper

served with respect to the acquired facilities (and the services rendered through those facilities) and continue to do so thereafter, in accordance with section 330.3 of the Commission's regulations.

By the Commission.
[SEAL]
Linwood A. Watson, Jr.,
Acting Secretary.

APPENDIX J

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 15B—NATURAL GAS

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person

from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

CREDIT(S)

(June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36; Oct. 24, 1992, Pub.L. 102-486, Title IV, § 404(a)(1), 106 Stat. 2879.)

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 15B—NATURAL GAS

§ 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all

contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural- gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time

when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

CREDIT(S)

(June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.)

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 15B—NATURAL GAS

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that

the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular

customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or

will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumers

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree

with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

CREDIT(S)

(June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459; Nov. 9, 1978, Pub.L. 95-617, Title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, Pub.L. 100-474, § 2, 102 Stat. 2302.)

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APPENDIX K

DOCKET NO. _____
EXHIBIT Z
PAGE 1 OF 11

N.M. OK. ARK. TX. LA.

TEXAS

LOUISIANA

MISSISSIPPI

TILDEN/McMULLEN LATERAL

CENTRAL TEXAS

NORTH HIGH ISLAND

CENTRAL LOUISIANA

SOUTHEAST LOUISIANA

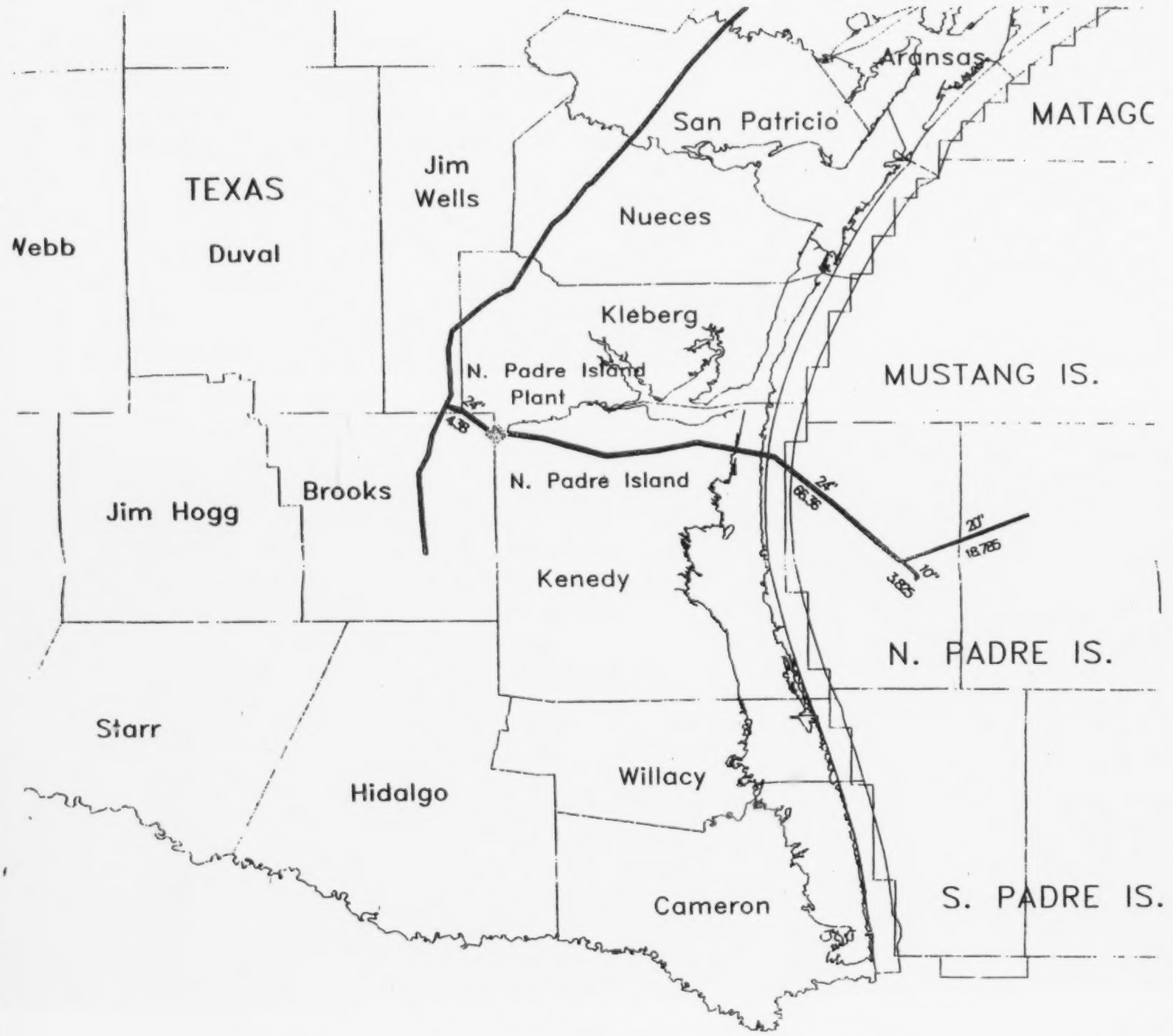
STA 80
STA 77
EMINENCE STORAGE
STA 70
STA 65
STA 54
STA 50
WASHINGTON STORAGE
STA 45
STA 40
STA 35
STA 44
JOHNSON BAYOU PLANT
STA 60
STA 32
STA 63
STA 62
BLACK BAYOU PLANT
STA 30
STA 24
MARKHAM PLANT
STA 20
TILDEN PLANT
BEE COUNTY PLANT
GOEBEL LATERAL
KING RANCH PLANT
N. PADRE ISLAND PLANT
N. PADRE ISLAND
UTOS
HIOS
EAST CAMERON
VERMILION
WEST CAMERON
EUGENE ISLAND
HIGH ISLAND
GALVESTON
MATAGORDA
BRAZOS
MUSTANG IS.
CORPUS CHRISTI
EAST BREAKS
GARDEN BANKS
SHIP SHOAL
SOUTH TIMBALIER
EWING BANK
MISSISSIPPI CANYON
ATWATER
MAIN PASS
VIOSCA KNOLL
WEST DELTA
SOUTH PASS
GREEN CANYON

LEGEND
- FACILITIES TO BE RETAINED BY TRANSCO
- FACILITIES TO BE ABANDONED TO WOP-OC
- COMPRESSOR STATIONS TO BE RETAINED BY TRANSCO
- COMPRESSOR STATIONS TO BE ABANDONED TO WOP-OC
- SEPARATION AND DEHYDRATION STATIONS TO BE ABANDONED TO WOP-OC
- SEPARATION STATIONS TO BE ABANDONED TO WOP-OC

Transco
TRANSCONTINENTAL GAS PIPE LINE CORPORATION

KEY MAP
LOCATION OF GATHERING FACILITIES
TO BE ABANDONED

Drawn By JLM	Date 12-14-95	Approved By T.P. Cross Manager of Planning
Checked By RJB	Date 12-14-95	
Approved By Drafting HKM	Date 2-20-96	
Approved By	Sheet of	Dwg. No. Z-1-11



LEGEND

- GATHERING FACILITIES TO BE TRANSFERRED TO WGP–GC
- FACILITIES TO BE RETAINED BY TRANSCO
- COMPRESSOR STATIONS TO BE RETAINED BY TRANSCO
- SEPARATION, DEHYDRATION OR PROCESSING PLANTS

LOCATION OF GATHERING FACILITIES TO BE ABANDONED NORTH PADRE ISLAND GATHERING SYSTEM

Williams
GAS PIPELINES
Transco

Drawn By TLJ	Date 11-10-00	Approved By	
Cheked By TWS	Date 11-10-00	Manager of Planning	
Approved By Drafting	Date		
Approved By	Sheet of	Dwg. No. 11	

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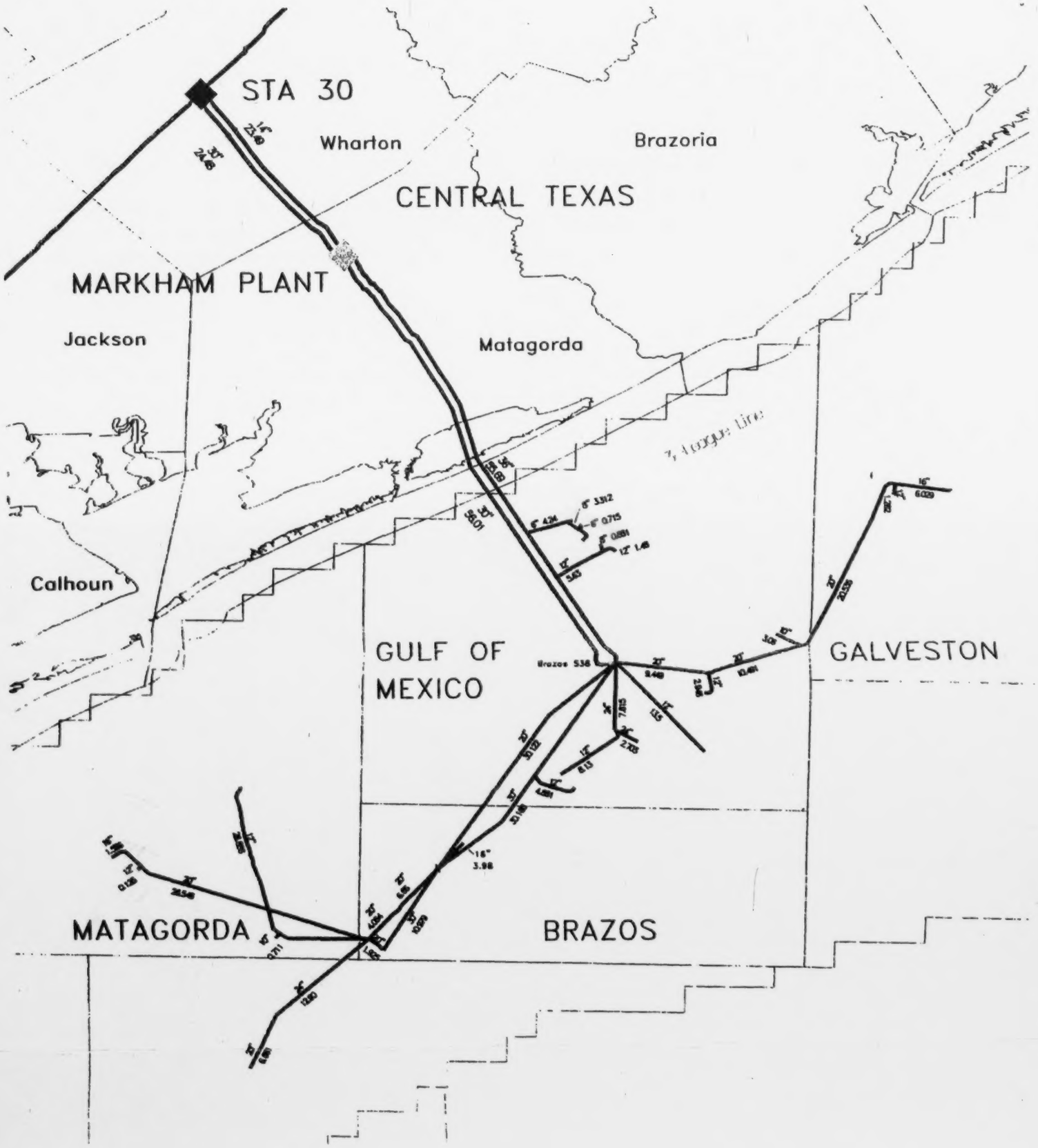

LEGEND

- GATHERING FACILITIES TO BE TRANSFERRED TO WGP-GC
- FACILITIES TO BE RETAINED BY TRANSCO
- COMPRESSOR STATIONS TO BE RETAINED BY TRANSCO
- SEPARATION, DEHYDRATION OR PROCESSING PLANTS

LOCATION OF GATHERING FACILITIES TO BE ABANDONED CENTRAL TEXAS GATHERING SYSTEM

Drawn By TLJ	Date 11-10-00	Approved By
Cheked By TWS	Date 11-10-00	Manager of Planning
Approved By Drafting	Date	4
Approved By	Sheet of	Dwg. No.

Williams

GAS PIPELINES
Transco

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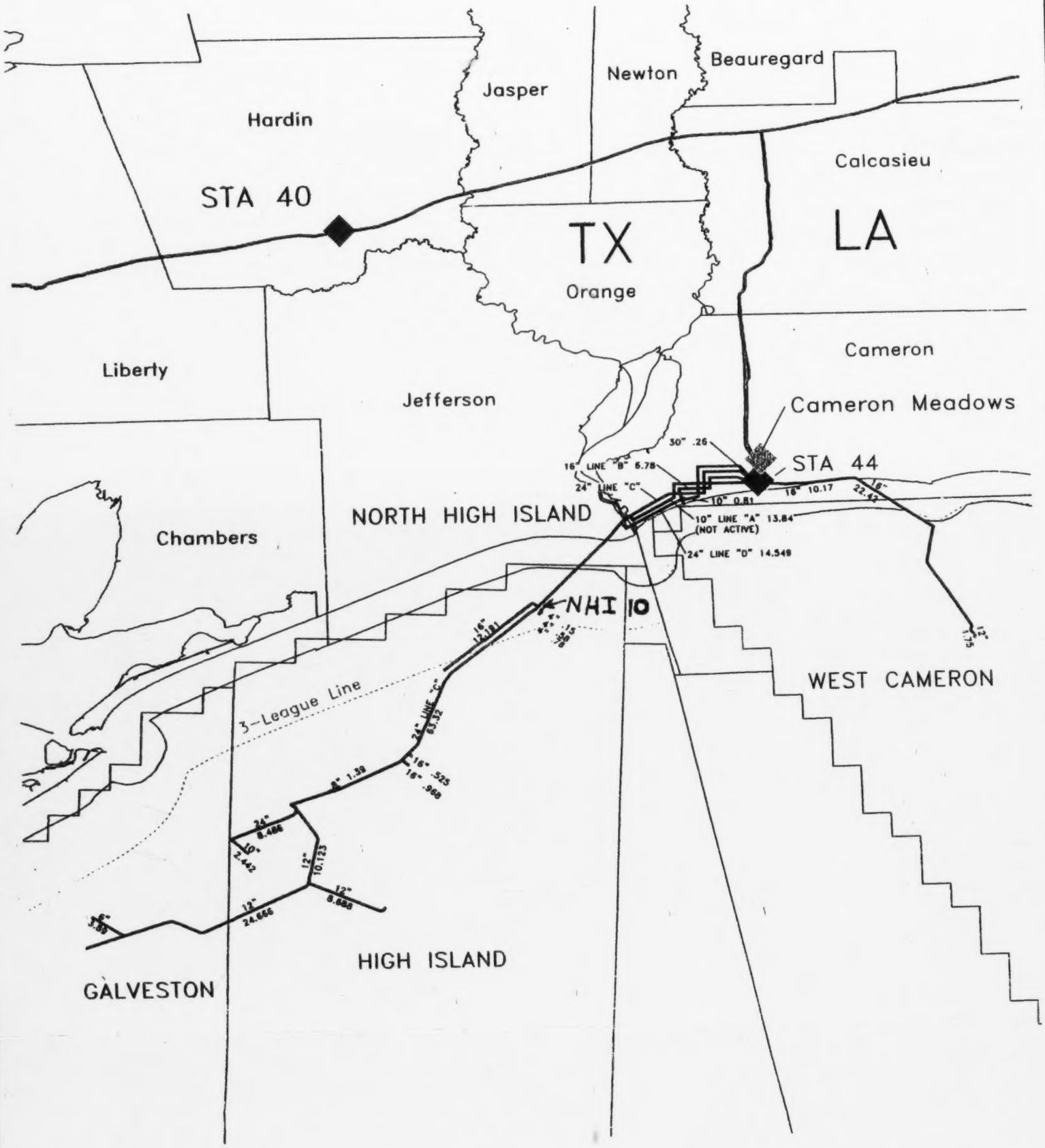

LEGEND

- GATHERING FACILITIES TO BE TRANSFERRED TO WGP-GC
- FACILITIES TO BE RETAINED BY TRANSCO
- COMPRESSOR STATIONS TO BE RETAINED BY TRANSCO
- PROCESSING PLANT

LOCATION OF GATHERING FACILITIES TO BE ABANDONED NORTH HIGH ISLAND/ WEST CAMERON GATHERING SYSTEM

Williams
GAS PIPELINES
Transco

Drawn By TLJ	Date 03-01-01	Approved By	
Cheked By TWS	Date 03-01-01	Manager of Planning	
Approved By Drafting	Date	Dwg. No	5
Approved By	Sheet of		

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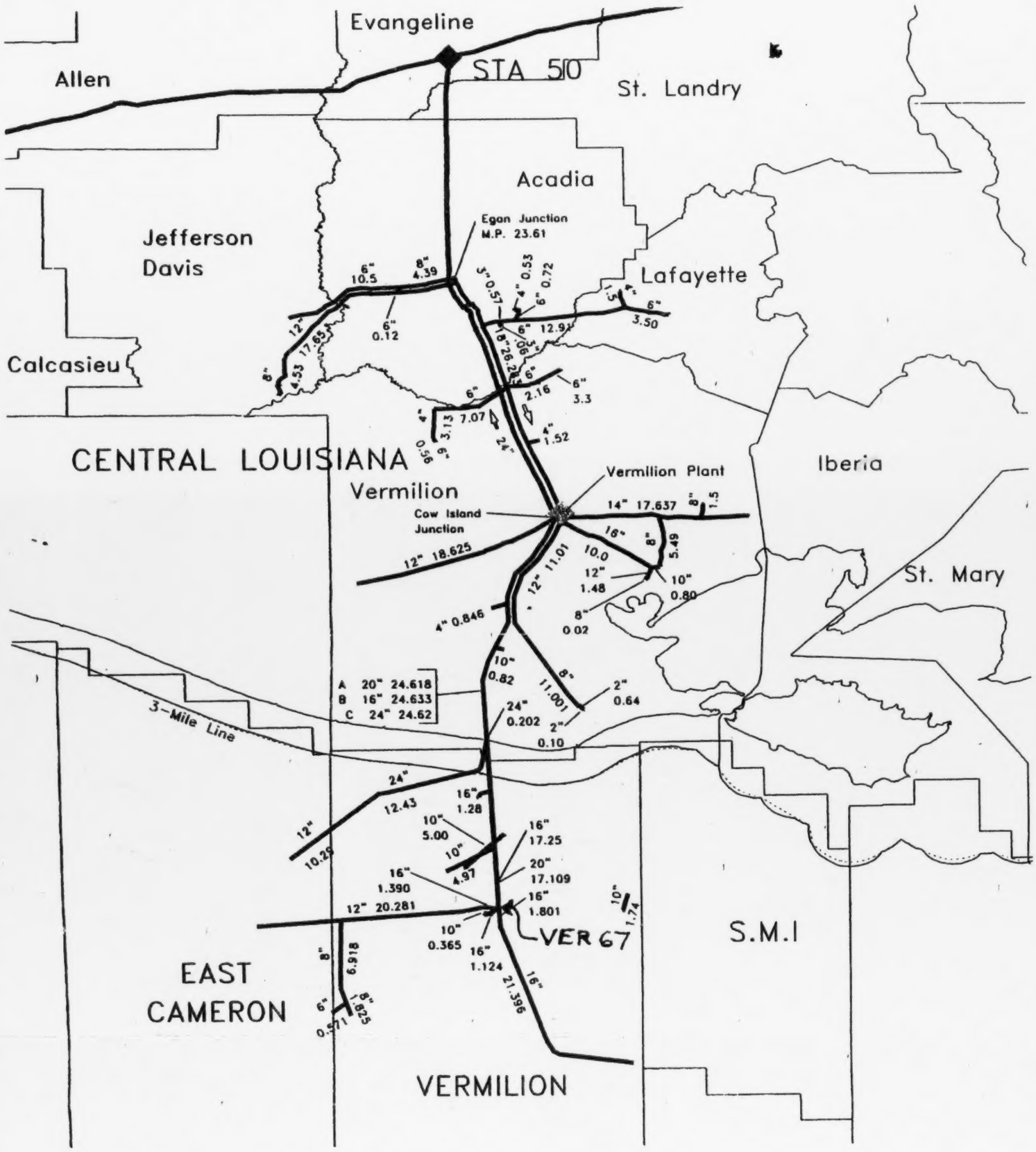

LEGEND

- GATHERING FACILITIES TO BE TRANSFERRED TO WGP-GC
- FACILITIES TO BE RETAINED BY TRANSCO
- COMPRESSOR STATIONS TO BE RETAINED BY TRANSCO
- SEPARATION, DEHYDRATION OR PROCESSING PLANTS

LOCATION OF GATHERING FACILITIES TO BE ABANDONED CENTRAL LOUISIANA GATHERING SYSTEM

Williams
GAS PIPELINES
Transco

Drawn By TLJ	Date 4-23-01	Approved By	
Checked By TWS	Date 4-23-01	Manager of Planning	
Approved By Drafting	Date	Dwg. No.	6
Approved By	Sheet of		

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Supreme Court, U.S.
FILED
DEC 1 - 2003
OFFICE OF THE CLERK

Nos. 03-147 and 03-431

In the Supreme Court of the United States

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

SHELL OFFSHORE INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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22 pp

QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) reasonably concluded that portions of Transco's pipeline system located on the Outer Continental Shelf involve the gathering of natural gas within the meaning of Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b).

2. Whether FERC was required to treat the reclassification of portions of Transco's system as nonjurisdictional as abandonment of jurisdictional facilities under Section 7(b) of the NGA, 15 U.S.C. 717f(b), and therefore to determine whether the action would further the public interest.

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Shell Offshore Inc. v. *Transcontinental Gas Pipe Line Corp.*, 100 F.E.R.C. ¶ 61,254 (2002), appeal pending *sub nom. Williams Gas Processing–Gulf Coast Co.* v. *FERC*, No. 03-1179 (D.C. Cir. docketed June 27, 2003)	6, 7, 9

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In the Supreme Court of the United States

No. 03-147

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 03-431

SHELL OFFSHORE INC., ET AL., PETITIONERS

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 331 F.3d 1011. The orders of the Federal Energy Regulatory Commission are reported at 96

[1] References to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 03-431.

F.E.R.C. ¶ 61,118 (Pet. App. 60a-97a), 97 F.E.R.C. ¶ 61,300 (Pet. App. 98a-126a), 96 F.E.R.C. ¶ 61,115 (Pet. App. 127a-167a), 97 F.E.R.C. ¶ 61,296 (Pet. App. 168a-197a), 96 F.E.R.C. ¶ 61,246 (Pet. App. 198a-234a), and 97 F.E.R.C. ¶ 61,298 (Pet. App. 235a-263a).

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2003. A petition for rehearing was denied on August 22, 2003. The petition for a writ of certiorari in No. 03-147 was filed on July 25, 2003, and in No. 03-431 on September 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, confers on the Federal Energy Regulatory Commission (FERC) jurisdiction to regulate certain aspects of the natural gas industry. The provisions of the NGA apply to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to," *inter alia*, "the production or gathering of natural gas." 15 U.S.C. 717(b).

The NGA gives FERC the authority to ensure that rates and charges for sales and transportation subject to its jurisdiction are "just and reasonable," and to declare as unlawful any "unjust, unreasonable, unduly discriminatory, or preferential" rate or charge for or "in connection with" any "transportation or sale of natural gas" subject to its jurisdiction. 15 U.S.C. 717c(a), 717d(a). The Act also requires that any natural gas company obtain a "certificate of public convenience and necessity" before constructing or operating new facili-

ties, 15 U.S.C. 717f(c), and further bars any natural gas company from "abandon[ing] all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that the present or future public convenience or necessity permit such abandonment," 15 U.S.C. 717f(b).

2. This case involves FERC's reclassification of portions of a pipeline's system operating on the Outer Continental Shelf (OCS) as non-jurisdictional gathering facilities within the meaning of 15 U.S.C. 717(b) and FERC's determination that 15 U.S.C. 717f(b) did not preclude the pipeline from transferring those facilities to its non-jurisdictional gathering affiliate.

Although the NGA does not define the term "gathering," this Court has stated that the terms "production and gathering" under the NGA are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963). Consistent with that principle, FERC has long defined the term gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957).

To differentiate jurisdictional transportation and non-jurisdictional gathering for pipelines, FERC for many years has employed two principal tests. Under the "behind-the-plant" test, facilities upstream of compressors and processing plants (*i.e.*, toward the wellhead where the gas comes out of the ground) were presumptively gathering facilities, while facilities downstream of the plants (*i.e.*, toward the consumer) were presumptively transportation facilities. For gas that

requires no processing, FERC has also employed a "central-point-in-the–field" test, under which lateral lines that collect and transport gas from separate wells and that then converge into a single large line were classified as gathering facilities, while facilities downstream of the collection point in a field were classified as transportation. Since 1983, FERC has subsumed those two tests into a "primary function" test that focuses on a number of physical factors (*e.g.*, length, diameter, and configuration of a pipeline) and certain other criteria, to determine whether facilities are primarily devoted to gathering or transportation. Under that test, no one factor is determinative, nor do all factors apply in every situation. Pet. App. 3a-4a; *ExxonMobil Gas Mktg. Co.* v. *FERC*, 297 F.3d 1071, 1077 (D.C. Cir. 2002), cert. denied, 124 S. Ct. 48 (2003); *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 368-369 (5th Cir. 1997).

FERC developed its primary function test in the context of onshore gathering patterns. For natural gas produced on the Outer Continental Shelf (OCS), pipelines generally are configured differently. "[P]ipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation." *ExxonMobil Gas Mktg. Co.*, 297 F.3d at 1077. "Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where 'only the most rudimentary separation and dehydration operations' are conducted, to the shore or a point closer to shore, where it can be processed into 'pipeline quality' gas." *Id.* at 1077-1078 (quoting *EP Operating Co.* v. *FERC*, 876 F.2d 46, 47-48 (5th Cir. 1989)); accord *Sea Robin Pipeline*, 127 F.3d at 369-370 (noting that pipelines on the OCS "must construct large pipes to carry (often

over a hundred miles away) the raw gas from offshore rigs to the shore for processing"). In response to the practical and physical differences between onshore and offshore pipeline configurations, FERC modified its primary function test for the OCS to allow for the increasing length and diameter of OCS gathering lines, *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990), and later announced that it would "presume facilities located in deep water [over 200 feet] are primarily engaged in gathering or production." *Gas Pipeline Facilities & Servs. on the Outer Continental Shelf—Issues Related to the Comm'n's Jurisdiction Under the Natural Gas Act and Outer Continental Shelf Lands Act*, 74 F.E.R.C. ¶ 61,222, at 61,759 (1996).

As a result of FERC's decision in Order 636[2] to promote competition by requiring pipelines to "unbundle" their previously bundled sales and transportation into separate services and to transport natural gas for all qualified shippers, *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1125-1127 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997), some such pipelines have sought to shed OCS facilities that primarily perform a gathering function. Accordingly, those pipelines have asked FERC to reclassify OCS facilities that were previously classified as transportation, and to authorize "spin-downs" of OCS gathering facilities to affiliates.

Even when granting such requests, FERC retains NGA rate jurisdiction over those reclassified facilities

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[2] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 3 F.E.R.C. Stats. & Regs. (CCH) ¶ 30,939 (Apr. 8, 1992).

that the pipeline retains. FERC "may regulate rates charged for transportation on the pipeline's own gathering facilities performed in connection with jurisdictional transportation." *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1263 (8th Cir.) (emphasis omitted), cert. denied, 502 U.S. 856 (1991). Moreover, in spin-down situations, where the pipeline and its non-jurisdictional gathering affiliate act in concert to frustrate FERC's rate regulation, FERC has disregarded corporate forms, treated the two affiliates as a single entity, and regulated the rates for gathering as rates charged "in connection with" the pipeline's transportation rates. *Shell Offshore Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 F.E.R.C. ¶ 61,254 (2002), appeal pending *sub nom. Williams Gas Processing–Gulf Coast Co.* v. *F.E.R.C.*, No. 03-1179 (D.C. Cir. docketed June 27, 2003).

3. The instant case involves the reclassification to gathering and request to spin-down all or parts of four OCS subsystems originally owned and operated by Transcontinental Gas Pipe Line Corporation (Transco) as jurisdictional transportation facilities. Three of those subsystems, North Padre Island, Central Texas and North High Island, which range in length from 23 to 270 miles of pipeline (Pet. App. 87a, 133a-134a), are each configured roughly in the form of a "Y," with legs that converge from OCS production areas into a central point of interconnection with a trunk or trunks that run to shore. *Id.* at 87a-88a, 158a-160a.[3] Facilities located on the legs collect gas from wells located along their length and deliver it to the central point. *Id.* at 87a-88a, 157a-160a. From there, trunklines carry the gas north

[3] The trunks are not part of the North Padre Island or Central Texas subsystems. Pet. App. 157a-160a.

to onshore processing plants for delivery to Transco's mainline transportation system. *Id.* at 88a, 133a-134a.

The fourth subsystem, Central Louisiana, includes approximately 200 miles of offshore pipeline, Pet. App. 203a, 225a, arrayed in a "spine and lateral" configuration. The trunklines (the "spine") extend 42 miles from shore to Vermillion Block 67 on the OCS; laterals reach out to OCS production areas from the trunklines and from Vermillion Block 67. *Id.* at 225a-226a. The laterals deliver gas from wells located along their length to the trunklines, which in turn, transport the gas to Transco's processing plant on Cow Island, just off the coast of Louisiana. *Id.* at 226a.

In March 2001, Transco submitted an application pursuant to 15 U.S.C. 717f(b), seeking permission to abandon the four subsystems and transfer them to Transco's affiliate, Williams Gas Processing—Gulf Coast Company (Williams). Williams, in turn, petitioned for declaratory orders reclassifying the subsystems as gathering facilities. In three separate orders, FERC granted in part and denied in part the relief sought. Pet. App. 60a-97a, 127a-167a, 198a-234a.

FERC reclassified the North Padre and Central Texas subsystems, and the portion of the North High subsystem existing upstream of the central aggregation point, as gathering, while continuing to classify the facilities downstream of those points as transportation. Pet. App. 89a, 157a. As to the Central Louisiana subsystem, FERC reclassified the laterals that were located upstream of Vermillion Block 67, and those that intersected with the looped trunklines, as gathering, while continuing to classify the trunklines as transportation. *Id.* at 226a. FERC allowed Transco to spin down all of the subsystems (*id.* at 92a, 164a, 230a), but retained rate jurisdiction over those subsystems that it

had declined to reclassify as gathering. *Id.* at 89a-90a, 227a.

The reclassified facilities exhibit the following physical characteristics: extension into production areas for collection of large volumes of gas from numerous wells; lengths and diameters that are dictated by the production areas' distance from shore and output of gas; operating pressures derived from well pressure rather than compression; and, in the case of three of the subsystems, convergence into central aggregation points from which trunklines carry the gas onshore. Pet. App. 87a-89a, 157a-161a, 225a-227a.

Regarding the request for abandonment, FERC stated that "[s]ince the facilities proposed to be abandoned were certificated to transport natural gas in interstate commerce * * *, the abandonment of Transco's certificated interests in the OCS facilities requires Commission authorization under NGA section 7(b)." Pet. App. 68a, 137a, 205a. FERC then specifically found that, based on a variety of factors, "the public convenience and necessity" permit the requested abandonment and transfer. *Id.* at 69a, 137a, 206a. FERC also stated its opinion that "section 1(b) of the NGA exempts gathering from the jurisdiction of this Commission. Thus, if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion to withhold such authorization." *Id.* at 75a, 143a, 212a. FERC denied rehearing, "reaffirm[ing] [its] conclusion that the abandonment is required and in the public interest." *Id.* at 104a, 174a, 241a.[4]

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[4] Prior to the court of appeals' decision, FERC exercised its "in-connection-with" rate authority under 15 U.S.C. 717c(a), 717d(a) to order Transco to file a just and reasonable gathering

Petitioners subsequently challenged FERC's reclassifications, and Transco challenged FERC's refusal to reclassify all of its subsystems as engaged in gathering.

4. The court of appeals affirmed. Pet. App. 1a-20a. The court observed that affirmance of FERC's gathering classifications was "instructed by [*ExxonMobil*, 297 F.3d at 1084], where the court stated that it will defer to FERC's reasonable determinations regarding gathering status under * * * 15 U.S.C. § 717(b)." Pet. App. 2a. The court held that in this case "FERC considered the appropriate factors under the primary function test and sufficiently explained its reasoning." *Id.* at 3a. The court concluded that none of the petitioners had demonstrated that FERC's demarcations between gathering and transportation were outside "a zone of reasonableness," *id.* at 2a (quoting *ExxonMobil*, 297 F.3d at 1084), and that FERC had properly applied the modified primary function test that the court had upheld in *ExxonMobil*. *Id.* at 16a-17a. The court explained that "FERC gave reasoned consideration to each of the pertinent factors, and its factual conclusions are supported by substantial evidence in the record." *Id.* at 17a.

The court of appeals also rejected petitioners' contention that FERC improperly granted the abandonment requests under 15 U.S.C. 717f(b). The court held that "once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility." Pet. App. 19a. The court of appeals also found that, "even though

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rate for the North Padre subsystem, after finding that Transco and its affiliate had acted in concert to frustrate FERC's regulation. *Shell Offshore*, 103 F.E.R.C. at 61,661.

[FERC] lacked the authority to deny abandonment,' FERC reasonably concluded that petitioners' public interest concerns "were unfounded." *Ibid.*

ARGUMENT

Petitioners renew their challenges to FERC's orders, contending that the Transco's entire system is engaged in jurisdictional transportation and that, assuming the reclassifications were proper, FERC was required by Section 7(b) of the NGA to find that the transfers of those facilities to Transco's affiliates were in the public interest. Neither of those contentions warrants this Court's review.

1. On August 14, 2003, FERC issued a public notice stating that on September 23, 2003, FERC would convene a public conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf and if so what the new test should be." Supp. Br. for the FERC App. at 1a-12a, *Producer Coalition* v. *FERC*, cert. denied, 124 S. Ct. 47 and 48 (2003) (Nos. 02-1215 and 02-1265) (*Notice of Public Conference, Application of the Primary Function Test for Gathering on the Outer Continental Shelf*, Docket No. AD03-13-000 (Aug. 14, 2003)). The Commission stated that its objective in issuing the notice was to develop a "clear, consistent approach to offshore gathering * * * to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function." *Id.* at 2a. FERC concluded that it would convene the public conference "to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the

regulatory goals of the Natural Gas Act." *Id.* at 10a. FERC also solicited comments on whether, "[i]f formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under [15 U.S.C. 717f(b)] before the facilities may be transferred to another company." *Id.* at 11a. The conference was held on September 23, 2003, at which petitioners submitted both written and oral comments. FERC is currently evaluating those and other comments, as well as continuing to receive comments from interested persons.

This Court should not address the legal, factual, and policy issues raised by the certiorari petitions before FERC has had the opportunity to receive public comment upon and consider (1) whether FERC should reformulate its test for determining nonjurisdictional gathering in the shallow waters of the OCS, and if so, what the relevant test and criteria should be, and (2) whether FERC should conduct abandonment proceedings for those formerly certificated facilities determined to be engaged in gathering. As FERC concluded, relevant to those questions are policy issues concerning the potential for "inconsistent classification and regulatory treatment" of similarly situated competitors as well as the impact on "customers who may have made investments relying on the regulated status of a transporter." Supp. Br. for the FERC App. at 10a, *Producer Coalition, supra* (Nos. 02-1215 and 02-1265).

Those and other policy issues, including the ones raised by petitioners (03-431 Pet. 27-29) are best directed in the first instance by FERC, which may reformulate its jurisdictional test for determining whether facilities operating in the shallow waters of the OCS are engaged in jurisdictional transportation or

nonjurisdictional gathering. Any new test would govern future requests to reclassify or abandon previously certificated transmission facilities. Moreover, should FERC adopt a new test, petitioners or Transco would be free to petition the FERC to reclassify some or all of Transco's facilities under 15 U.S.C. 717c, 717d, and 717f. Finally, because any review of the substance and application of the Commission's test would be subject to review under *Chevron*, this Court should decline review of the court of appeals' decision in view of FERC's Notice concerning the possible reformulation of its test.

2. Petitioners' highly technical and fact-bound challenge to FERC's reclassification determination also does not warrant this Court's review. In reclassifying some, but not all, of Transco's offshore system as gathering facilities, FERC rejected petitioners' position that *all* of the subject subsystems engage entirely in transportation, as well as Transco's contention that the entire North High Island, Central Louisiana and West Cameron subsystems engage in gathering. Correctly applying a deferential standard of review, the court of appeals held that FERC had reasonably reclassified portions of the subsystems based on its consideration of the particular physical factors in each case. For the reasons explained in our brief in opposition to the petitions for a writ of certiorari in No. 02-1215 (*Producer Coalition* v. *FERC*, 124 S. Ct. 47 (2003)) and No. 02-1265 (*ExxonMobil Gas Mktg.* v. *FERC*, 124 S. Ct. 48 (2003)), FERC's orders and the court of appeals' decisions in this case and *ExxonMobil* are entirely consistent with this Court's decision in *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84 (1963). Indeed, we are aware of no court decision (and petitioners cite to none) that supports

petitioners' novel view (03-431 Pet. 15-22; 03-147 Pet. 6) that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation. Quite to the contrary, those courts to have considered petitioners' contention have rejected it. *ExxonMobil*, 297 F.3d at 1085-1086; *Sea-Robin*, 127 F.3d at 369-371; *EP Operating*, 876 F.2d at 48-49.[5]

As the court of appeals properly found (Pet. App. 14a-17a), FERC's orders exhaustively reviewed the relevant physical criteria and specifically found that some (but not all) of Transco's systems were engaged in gathering. Petitioner's fact-bound contentions to the contrary merit no further review.[6]

3. a. The Shell Offshore petitioners, but not petitioner Producer Coalition, also argue (03-431 Pet. 25-27) that the court of appeals improperly permitted FERC to grant the abandonment of portions of Transco's facilities without finding the abandonment to be in the

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[5] Indeed, FERC's jurisdictional line-drawing is applied *more* favorably to producers offshore than onshore. In the offshore context, the gas does not enter the processing plant—where it attains pipeline quality—until it reaches shore. Pet. App. 64a, 131a, 201a. FERC nonetheless has determined that Transco's offshore gathering ends well upstream of the processing plant. *Id.* at 89a, 159a-160a, 226a.

[6] The Shell Offshore petitioners incorrectly suggest (03-431 Pet. 24) that FERC may classify a facility as engaged in gathering only if a State could regulate the activity under the Commerce Clause. Of course, the pipelines at issue here are offshore, and so acceptance of petitioners' contention presumably would mean that FERC lacks the authority to reclassify any pipeline even if it is unquestionably engaged in gathering functions. In any event, this Court has stated that Congress in the NGA "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power." *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

public interest under 15 U.S.C. 717f(b). That contention lacks merit.

The NGA bars any natural gas company from "abandon[ing] all or any portion of its facilities *subject to the jurisdiction of the Commission*, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that the present or future public convenience or necessity permit the abandonment." 15 U.S.C. 717f(b) (emphasis added). By its plain terms, the abandonment provision "covers only 'facilities subject to the jurisdiction of the Commission'" and cannot be used to expand FERC's authority "over the production and gathering of gas." *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 509 (1949) (quoting 15 U.S.C. 717f(b)). The court of appeals correctly held that "once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility." Pet. App. 19a.

In any event, this case would be an inappropriate vehicle in which to consider petitioners' contentions to the contrary because FERC granted the precise relief petitioners seek, *i.e.* a determination whether Transco's transfers would be in the public interest. As a result, although FERC expressed the view that the Commission lacked the discretion to deny abandonment of non-jurisdictional facilities, Pet. App. 75a, 143a, 212a, FERC also unquestionably found that "the public convenience and necessity" permitted Transco's requested abandonment and transfer to its affiliate. *Id.* at 69a, 137a, 206a.

Specifically, FERC observed that Transco had responded to FERC's unbundling policies in Order No. 636 by replacing its bundled services with "an array of

unbundled services, such as transportation, storage, and fully unbundled sales services, to a wide variety of customers." Pet. App. 68a-69a, 137a, 206a. Thus, "Transco no longer require[d] its extensive gathering facilities to provide [bundled] gas sales." *Id.* at 69a, 137a, 206a. FERC concluded that the proposed spin-down would permit "Transco to eliminate unnecessary expenses associated with these [reclassified] facilities" and Williams to "make efficient use of the acquired facilities to provide open access gathering service." *Id.* at 137a; see also *id.* at 69a, 206a. FERC also concluded that the transfer "is consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." *Id.* at 75a, 143a, 212a.

Significantly, FERC further explained that on approval of the spin-downs, the gathering facilities would be subject to the OCSLA, which would prevent Williams "from discriminating against any shipper that seeks access to the facilities." Pet. App. 76a, 144a, 213a. FERC also explained that Williams had represented to FERC that it would negotiate new agreements "with all shippers that should not result in degraded service." *Id.* at 76a, 144a. Finally, FERC pointed out that FERC's regulatory authority over Transco's tariffs would provide further protection. *Id.* at 77a, 145a.

On rehearing, FERC reiterated its conclusion that the transfers were in the public interest, rejecting petitioners' concerns that Williams would "be able to take advantage of its existing control of the [gathering] market in order to exact monopoly rents from shippers." Pet. App. 104a, 174a, 241a. FERC reaffirmed its findings that its unbundling policies "should, in the long run, promote competition"; that OCSLA would prevent Williams "from discriminating against any shipper"

seeking access to Williams' facilities; and that "Transco's existing tariff standards" would prevent the pipeline "from acting in a discriminatory manner." *Id.* 104a-105a, 174a, 241a. FERC also observed that Williams "has agreed to continue to serve Transco's existing customers following the facilities' transfer," thereby "avoid[ing] any abrupt disruption to Transco's customers' expectations." *Id.* at 104a-105a, 174a-175a, 241a-242a.

The court of appeals found those conclusions reasonable, explaining that "FERC has taken the long view, concluding that Order No. 636's unbundling policies create competitive conditions and that, combined with the standards of conduct for gathering facilities in Transco's tariff, the OCSLA sufficiently guards against the exercise of monopoly power." Pet. App. 19a. Significantly, petitioners do not challenge FERC's extensive factual findings or the court of appeals' affirmance of FERC's conclusions. There is accordingly no basis for this Court to grant plenary review simply to determine whether FERC was required to make the public interest determination that FERC in fact has already made.

b. Petitioners also argue (03-431 Pet. 25-27) that the court of appeals' conclusion that no public interest finding was necessary conflicts with the Fifth Circuit's decision in *Pacific Gas & Electric Co.* v. *FERC*, 106 F.3d 1190, cert. denied, 522 U.S. 811 (1997). As discussed above, however, resolution of that purported conflict would not aid petitioners, since FERC has already concluded that the transfers at issue in this case further the public interest. In any event, the court of appeals' decision does not squarely conflict with *Pacific Gas*, which did not even involve reclassified facilities. Rather, the Fifth Circuit in *Pacific Gas*

rejected FERC's assertion in that case that FERC lacked "the power to examine whether abandonment would be in the public interest when a pipeline is abandoning its gathering facilities *to a nonjurisdictional entity*." 106 F.3d at 1197 (emphasis added). The court reached the unremarkable conclusion that the jurisdictional status of the *transferee* is irrelevant, explaining that "it makes no difference who gets the facilities or, indeed, whether anyone gets them at all." *Ibid.*

Pacific Gas thus did not address the precise question addressed by the court of appeals in this case, *i.e.*, whether FERC must make a public interest finding when it reclassifies a facility as no longer engaged in jurisdictional services. Indeed, the court of appeals below apparently recognized the absence of a square conflict when it stated that "[w]e part company with [*Pacific Gas*] *to the extent it holds* that FERC has discretion to examine whether abandonment would be in the public interest." Pet. App. 19a (emphasis added).

Furthermore, as explained above (see pp. 10-12, *supra*), in its reeent notice seeking public comment on various issues concerning the classification and reclassification of facilities on the OCS, FERC specifically solicited comments on whether it may require a company to file an application for abandonment under 15 U.S.C. 717f(b) before facilities that have been found to be nonjurisdictional gathering facilities are transferred to another company. As with the first question presented in the case concerning FERC's approach to distinguishing between gathering and transportation on the OCS, FERC should be give the opportunity to address the abandonment issue in the first instance before review by this Court. For this additional reason, review of the abandonment issue is not warranted in

this case even if the issue were otherwise appropriate for review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-147 AND 03-431

IN THE

Supreme Court of the United States

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P., AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether, consistent with this Court's *Chevron* principles, the Court of Appeals for the District of Columbia Circuit properly affirmed orders of the Federal Energy Regulatory Commission which ruled that: (1) certain offshore natural gas facilities are "gathering" facilities exempt from the Commission's jurisdiction under section 1(b) of the Natural Gas Act ("NGA"); and (2) such NGA-exempt facilities are not subject to the abandonment requirements of NGA section 7(b).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the rules of this Court, Respondents Williams Gas Processing-Gulf Coast Company, L.P. ("WGP") and Transcontinental Gas Pipe Line Corporation ("Transco") state that:

The parent companies and any publicly-held company that have a 10% or greater ownership interest in WGP are:

The Williams Companies, Inc.
Williams Energy Services, LLC
Williams Field Services Group, Inc.
Williams Field Services Company
WGP Enterprises, Inc.

The parent companies and any publicly-held company that have a 10% or greater ownership interest in Transco are:

The Williams Companies, Inc.
Williams Gas Pipeline Company, LLC

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IN THE

Supreme Court of the United States

No. 03-147

THE PRODUCER COALITION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

No. 03-431

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS WILLIAMS GAS PROCESSING-GULF COAST COMPANY, L.P., AND TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

Respondents Williams Gas Processing-Gulf Coast Company, L.P. ("WGP") and Transcontinental Gas Pipe Line Corporation ("Transco") respectfully request that this Court deny the above-captioned petitions for writs of certiorari,

which seek review of *Williams Gas Processing–Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) ("*Williams*"). Transco is a natural gas pipeline engaged in the transportation of natural gas subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or the "Commission") under the Natural Gas Act ("NGA"). 15 U.S.C. § 717, *et seq.* WGP is an affiliate of Transco that owns and operates NGA-exempt "gathering" facilities located primarily on the Outer Continental Shelf ("OCS") of the Gulf of Mexico. In *Williams*, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld FERC orders ruling that certain of Transco's OCS pipeline facilities are NGA-exempt "gathering" facilities which Transco is authorized to transfer to WGP. Petitioners assert that the orders affirmed in *Williams* reflect an impermissible interpretation of the NGA's gathering exemption and abandonment requirements. WGP and Transco respectfully submit that the D.C. Circuit, in affirming FERC's orders, properly applied the two-step analysis prescribed by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defens. Council*, 467 U.S. 837 (1984). Accordingly, review by this Court is unwarranted.

SUMMARY

The instant petitions present essentially the same issues raised by virtually the same Petitioners in recently seeking review of *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002).[1] This Court denied those earlier

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[1] The Producer Coalition characterized its *Williams* petition (at 2) in Case No. 03-147, filed July 25, 2003, as a "follow along petition" to the earlier petitions of *ExxonMobil* filed in *The Producer Coalition v. FERC*, Case No. 02-1215, and *ExxonMobil Gas Marketing Co. v. FERC*, Case No. 02-1265. Shell Offshore Inc., *et al.*, in their petition in Case No. 03-431 (at 1), filed September 15, 2003, note the "close relationship" between the *Williams* and *ExxonMobil* decisions and the "[s]ubstantially similar issues presented." ("Petition No. 03-431")

petitions on October 6, 2003, and denial is appropriate again here. Indeed, Petitioners had requested "in tandem" consideration of the *ExxonMobil* and *Williams* petitions "because they involve the same issues and the *Williams* decision below relies heavily on *ExxonMobil*."[2] Moreover, shortly after *Williams* was decided, certain of the *ExxonMobil* Petitioners filed a Supplemental Brief addressing the issues presented by *Williams* as support for review of *ExxonMobil*.[3] Thus, this Court has already seen and rejected the Petitioners' arguments for review based on *Williams*.

Denial of review again is supported by a number of factors. First, as noted in FERC's Supplemental Brief opposing the *ExxonMobil* petitions, FERC has recently initiated a comprehensive review of the OCS jurisdictional test and abandonment policy applied in *Williams*. *See Notice of Public Conference, Application of the Primary Function Test on the Outer Continental Shelf*, Docket No. AD03-13-000 (August 14, 2003). (App. 1a). As part of that process, FERC has asked for suggestions from interested persons on developing a new test for gathering on the OCS. *Id.* at 9a. WGP and Transco (through their parent The Williams Companies, Inc.), as well as each of the Petitioners, filed comments proposing significant changes to the Commission's current OCS jurisdictional test and policies. These complex, fact-oriented jurisdictional issues are best addressed in the first instance by the FERC.

Second, the central concern that Petitioners allege in support of review, *i.e.*, that FERC's relinquishment of NGA jurisdiction will subject OCS shippers to the unconstrained

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[2] Petitioners' Joint Motion to Defer Consideration of Petitions for Writ of Certiorari to Subsequent Conference, at 3-4, filed Sept. 12, 2003 in Case Nos. 02-1215 and 02-1265.

[3] Supplemental Brief of ExxonMobil Gas Marketing Co., *et al.*, filed June 23, 2003 in Case No. 02-1265.

monopoly power of OCS pipelines, is simply incorrect. Petitioners disregard the fact that Congress enacted the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*, to guarantee shippers open and nondiscriminatory access to all OCS pipelines, including NGA-exempt gathering lines. Moreover, many OCS pipelines, some owned by Petitioners, have never been regulated under the NGA.

Finally, Petitioners' jurisdictional theories would jettison the legal basis that has governed more than fifty years of natural gas industry regulation, including the past two decades of industry restructuring that has increased competition and market access through the "unbundling" of natural gas sales, transportation, and gathering services.

STATUTES INVOLVED

In addition to the statutes attached to the petitions, this case involves various provisions of the OCSLA, which are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

This case concerns applications filed by Transco to transfer (*i.e.*, "spindown") certain OCS pipeline facilities to WGP, and WGP's related requests that FERC confirm those facilities to be NGA-exempt "gathering." FERC approved the spindowns in part, finding that some of the subject facilities function as NGA-exempt gathering, but also denied in part, finding that other of the subject facilities function as jurisdictional transportation facilities.[4] Transco

[4] *See* Petition No. 03-431 at App. 21a-263a. Given FERC's denial of substantial portions of the requested relief (together with FERC orders in other pending proceedings also adversely impacting the spindowns), Transco/WGP's proposed spindowns have not yet been implemented, with the exception of the transfer of portions of the North Padre Gathering System. The remaining OCS facilities that were subject to the spindowns (*i.e.*, the Central Texas, North-High-Island/West-Cameron, and Central Louisiana gathering systems) continue to be owned by Transco.

and WGP appealed FERC's orders to the D.C. Circuit, claiming that FERC should have found that all of the subject facilities are NGA-exempt gathering, while Petitioners appealed to the D.C. Circuit claiming that none of the subject facilities constitute NGA-exempt gathering. In *Williams*, the D.C. Circuit denied all of the petitions and affirmed FERC's orders.

The spindown of NGA-exempt "gathering" by interstate pipelines is an outgrowth of congressional and regulatory enactments that restructured the natural gas industry. By way of background, since the NGA's inception in 1938, section 1(b) has stated that the NGA "shall not apply to . . . the production or gathering of natural gas." 15 U.S.C. § 717(b). Consistent with that statutory restriction, FERC never regulated gathering performed by "independent" gatherers, *i.e.*, those that do not also provide bundled NGA-jurisdictional services. In contrast, gathering and production activities performed by interstate pipelines were historically FERC-regulated because those activities were "bundled" with the pipelines' NGA-jurisdictional sales and transportation services.[5]

In the 1970s, the structure of the natural gas industry changed dramatically in response to the failure of gas price controls and resulting gas shortages. *See United Distr. Cos. v. FERC*, 88 F.3d 1105, 1123 (D.C. Cir. 1996). Those circumstances prompted Congress to enact measures to limit regulation and foster competition in the natural gas industry. For example, the Natural Gas Policy Act of 1978, 15 U.S.C.

Accordingly, FERC continues to exercise NGA rate jurisdiction over those facilities owned by Transco.

[5] Such authority was recognized by this Court in *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (NGA "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company . . . for the purposes of determining the reasonableness of rates subject to its jurisdiction").

§ 3301, *et seq.*, required the phased deregulation of wellhead prices for certain categories of gas, and later the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989), phased out all remaining wellhead price controls. Following Congress' lead, FERC established a program of open-access and nondiscriminatory transportation, and later mandated the unbundling of gas sales and transportation. *Conoco Inc. v. FERC*, 90 F.3d 536, 539-40 (D.C. Cir. 1996). Congress saw the Commission's implementation of open-access transportation as "essential" to its decision to deregulate wellhead sales. *See United Distribution*, 88 F.3d at 1125.

This industry restructuring ended the interstate pipelines' decades-old role as merchants of "bundled" service (*i.e.*, purchasing, gathering, transporting, and reselling natural gas as a single service) and transformed them into open-access transporters. *See id.* at 1122-30. Absent their former merchant sales obligations, pipelines no longer needed to own extensive gathering systems to secure gas supplies (*see Conoco*, 90 F.3d at 539-41), and pipelines began "unbundling" their NGA-exempt gathering facilities from their NGA-regulated transportation facilities. To facilitate unbundling, FERC required pipelines to "'separately identify cost components attributable to transportation, storage, and gathering costs.'"[6] With gathering unbundled as a stand-alone service, various interstate pipelines transferred their gathering facilities to non-NGA-regulated companies that could compete on equal footing with non-NGA-regulated

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[6] *Policy Statement Providing Guidance with Respect to the Designing of Rates*, 47 FERC ¶ 61,295, at 62,059 (1989) (quoting regulations now codified at 18 C.F.R. § 284.10(c)). *See also Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates*, 65 FERC ¶ 61,136, at 61,690 (1993) ("The Commission has required gathering rates to be separately stated and unbundled from mainline transportation rates in a number of restructuring cases.").

independent gatherers, including a number of the Petitioners (or their affiliates). *See Conoco*, 90 F.3d at 541. While the unbundling of *onshore* gathering facilities has largely been completed with court approval,[7] pipelines such as Transco likewise have requested FERC jurisdictional determinations to unbundle *offshor*e gathering facilities.

In tandem with these pro-competitive restructuring initiatives, Congress amended and strengthened the OCSLA to ensure the expeditious and orderly development of OCS resources consistent with certain "competitive principles" to protect OCS shippers. *See* OCSLA Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978). Among other things, the OCSLA requires *all* OCS pipelines to "provide open and nondiscriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334(f)(1)(A).

REASONS FOR DENYING THE PETITIONS

A. FERC Has Initiated A Comprehensive Review Of The OCS Gathering Policy Applied In *Williams*.

On August 14, 2003, FERC issued a Notice of Public Conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." (App. 1a). *See also*, FERC's Supplemental Brief opposing the *ExxonMobil* Petitions denied in Case Nos. 02-1215 and 02-1265. FERC's Notice reviewed the history and evolution of its jurisdictional test for NGA-exempt gathering and expressed dissatisfaction with the reformulated primary function test applied in *ExxonMobil* and *Williams*. (App. 1a-9a). Thus, FERC scheduled, and ultimately convened, a public conference on

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[7] *See Conoco, supra; Pac. Gas & Elec. Co. v. FERC*, 106 F.3d 1190 (5th Cir. 1997); *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193 (D.C. Cir. 2000).

September 23, 2003 "to hear suggestions from interested persons on developing a new test for gathering on the OCS . . . [that would] provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated market power of third party transporters." (App.9a). FERC also invited the submission of written comments. (App.10a).

FERC's Notice listed four questions to be addressed, which questions encompass all of the issues presented herein by Petitioners:

> 1. To what extent should a gathering test that [sic] be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?
>
> 2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?
>
> 3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?
>
> 4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas [A]ct before the facilities may be transferred to another company?

(App. 9a-10a).

FERC developed an extensive record from a diverse group of market participants regarding these OCS jurisdictional and policy questions. FERC is now considering these issues with

the benefit of actual operating experience under the reformulated test applied by FERC in *ExxonMobil* and *Williams*, and with the benefit of broad industry input. Each of the Petitioners actively participated by presenting a representative at the public conference and/or through written comments (pre- and post-conference). Significantly, the Producer Coalition (Petitioners in Case No. 03-147) proposed that, for a one-year period after the adoption of a new jurisdictional test, "all cases decided since June 30, 1999 [*i.e.*, the date FERC adopted the reformulated test in *ExxonMobil*] that reclassified existing jurisdictional facilities to gathering should be open to review." *Post-Conference Comments of the Producer Coalition*, Docket No. AD03-13-000, at 3 (October 3, 2003). While FERC has not yet taken any formal action in response to the conference, it is appropriate that FERC in the first instance apply its expertise, with industry guidance, to these complex OCS jurisdictional and policy questions. Similarly, it makes little sense for this Court to devote its resources to reviewing the current jurisdictional test that is being reconsidered and likely revised. For these reasons, the Petitions should be denied.

B. There Is No Regulatory Gap With Respect To NGA-Exempt Gathering Lines On The OCS.

Petitioners argue that FERC's non-jurisdictional determinations affirmed in *Williams* will leave OCS shippers subject to the unconstrained market power of NGA-exempt pipelines. That assertion is untrue because the OCSLA protects all shippers on all OCS pipelines, including NGA-exempt gathering lines. Petitioners' claim is also misleading because about half of the OCS pipeline facilities have never been NGA regulated.[8]

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[8] *See Transcontinental Gas Pipe Line Corp.*, 97 FERC ¶ 61,298, at 62,400 (2001) ("While almost all NGA-regulated pipe is located in

When Congress amended the OCSLA in 1978 (at about the same time that it commenced decontrol of wellhead gas prices), it specifically rejected an amendment to extend NGA jurisdiction to all OCS gas pipelines. 124 Cong. Rec. 2092-93 (Feb. 2, 1978). Moreover, Congress recognized that "the Outer Continental Shelf is a vital national re[illegible]ce . . . which should be made available for expeditious and orderly development . . . in a manner which is consistent with the maintenance of *competition* and other national needs." 43 U.S.C. § 1332(3) (emphasis added). *See also* 43 U.S.C. § 1801(7) (finding that the OCS must be managed "to preserve and maintain competition"); 43 U.S.C. § 1802(2)(D) (a purpose of the Act is "to preserve and maintain free enterprise competition"); 43 U.S.C. § 1334(a) (requiring consultation with the Attorney General on "matters which may affect competition"); 43 U.S.C. § 1334(f) (mandating "competitive principles" to govern OCS pipeline operations).

Chief among those "competitive principles" was Congress' mandate that every OCS permit or other grant of authority require that the OCS pipeline "must provide open and non-discriminatory access to both owner and nonowner shippers." 43 U.S.C. § 1334 (f)(1)(A). Other sections of the OCSLA allow FERC in appropriate circumstances to allocate pipeline capacity in "proportionate amounts" (43 U.S.C. § 1334 (e)), order pipeline expansions (43 U.S.C. § 1334 (f)(1)(B)), and condition permits to ensure compliance with the OCSLA's "competitive principles." 43 U.S.C. § 1334 (f)(1). Violators of the OCSLA are subject to injunctions and civil and criminal penalties (43 U.S.C. § 1350), as well as citizens suits. 43 U.S.C. § 1349.[9] In short, Congress was well aware that its

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shallow water, approximately half of all the facilities found in shallow water are NGA-exempt production and gathering facilities.").

[9] In *The Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003), the court held that while FERC has certain specific grants of authority in OCSLA sections 1334 (e) and (f), it does not have general enforcement

OCSLA regulatory scheme would leave OCS "gathering" pipelines exempt from NGA rate regulation, but chose instead to regulate OCS pipelines by enhancing "competition" and providing comprehensive non-NGA mechanisms, described above, to prevent abuse in the marketplace.[10]

C. *Williams* Is Consistent With *Northern Natural* and Other Decisions Of This Court and The Circuits.

The decision below properly applied *Chevron's* two-step analysis in reviewing FERC's interpretation of the term "gathering" as used in NGA section 1(b). In that regard, no party disputes that, in the NGA, Congress has not "directly spoken to" the meaning of the term "gathering." *Chevron*, 467 U.S. at 842. Thus, the reviewing court's task is to determine "whether the agency's answer is based on a permissible construction of the statute" (*id.* at 843), and it must accord "deference" and "considerable weight" to the agency's construction. *Id.* at 844. Petitioners argue that FERC's interpretation of NGA section 1(b) conflicts with *Northern Natural Gas Co. v. State Corp. Commission*, 372 U.S. 84 (1963) and other decisions of this Court and the Circuits. Petitioners have misconstrued the applicable precedent.

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authority. The authority to administer and enforce the OCSLA is granted to other agencies, such as the Secretary of Interior, the Attorney General, and the Secretary of Energy. *See, e.g.*, 43 U.S.C. §§ 1331(b), 1334(a) (c) (e) (f) (g) (h) (i), 1349, 1350.

[10] Of course, a purported "regulatory gap" cannot support Commission jurisdiction over facilities that otherwise qualify as exempt "gathering." *ExxonMobil*, 297 F.3d at 1088 ("We emphatically agree that 'need for regulation cannot alone create authority to regulate'") (quoting *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365, 371 (5th Cir. 1997)); *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1412 (10th Cir. 1990) ("If, upon proper application of the primary function test, the facilities are indeed exempt from Commission jurisdiction, whatever 'attractive [regulatory] gap' results was clearly created by Congress.").

1. *Northern Natural* is a preemption case that concerned orders of the Kansas State Corporation Commission requiring pipelines to purchase gas "ratably" from all Kansas wells to which they are connected. *Id.* at 86. This Court rejected the argument that the NGA's "production or gathering" exemption allowed the state to dictate the manner in which sales are made in interstate markets. *Id.* at 89-93. The Court explained that "'production' and 'gathering' are terms narrowly confined to the *physical* acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Id.* at 90 (emphasis added). Thus, the holding of *Northern Natural* focused upon the "physical" basis for NGA-exempt gathering, as distinct from business activities such as gas sales conducted from the gathering facilities.[11]

Petitioners erroneously claim that *Williams* conflicts with *Northern Natural*. First, Petitioners argue that *Northern Natural* reflects a "bright line" dividing state and federal jurisdiction based on Congress' purported intent in the NGA to extend federal jurisdiction to the full extent of its authority under the Commerce Clause. Petition No. 03-431 at 16-17. However, *Northern Natural* says no such thing, and Petitioners cite nothing in *Northern Natural* to support their theory. More importantly, Petitioners' interpretation of *Northern Natural* is flatly contradicted by this Court's recognition that:

> When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. *It "**did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power**.*

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[11] *See also, Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, 681 (1954) ("[T]he 'production or gathering' exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas," but not to "the 'business' of production or gathering, with the sale of the product considered an integral part of such 'business.'").

> Rather it contemplated the exercise of federal power as specified in the Act." *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-503 (1949). Indeed, Congress went so far in § 1(b) of the NGA, 15 U.S.C. § 717(b), as to prescribe not only "the intended reach of the [federal] power, but also [to] specif[y] the areas into which this power was not to extend." 337 U.S. at 503. Section 1(b). . . ***expressly reserv[ed] to the States the power to regulate, among other things "the production or gathering of natural gas . . . ."***

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 510 (1989) (emphasis added). *See also, Sea Robin*, 127 F.3d at 368 (5th Cir. 1997); *ExxonMobil*, 297 F.3d at 1076.

Petitioners further argue that *Williams* (and *ExxonMobil* on which it relies) conflict with *Northern Natural* because FERC failed to show that the facilities ruled to be gathering were confined to the "physical acts of drawing gas from the earth and preparing it for the first stages of distribution," nor that such facilities "relate . . . to established matters of 'local concern.'" Petition No. 03-431 at 19-20. To the contrary, FERC satisfied those standards by applying the physical criteria of its "primary function" test to distinguish NGA-exempt gathering from NGA-jurisdictional transmission.

For over fifty years, the Commission has relied on pertinent physical criteria to distinguish exempt gathering from jurisdictional transportation, and since 1983 those criteria have been embodied in the Commission's "primary function" test. *ExxonMobil*, 297 F.3d at 1077. The primary function test considers: (1) length and diameter of the pipeline; (2) extension of the facility beyond the central point in the field; (3) geographic configuration of the facility; (4) location of compressors and processing plants; (5) location of wells along all or part of the facility; and (6) operating pressure of the lines. *Id.* The oldest of

those criteria is factor (4), referred to as the "behind-the-plant test," dating back to the landmark decision in *Phillips, supra* (reversing Commission decision to exempt gas sales from NGA jurisdiction, but leaving intact the exemption of gas processing plants and the upstream facilities delivering gas to them). In its order underlying *Phillips*, the Commission explained the rationale for the behind-the-plant test, stating:

> [W]e find the movement of gas by Phillips to those [processing] plants to constitute gathering within the meaning of section 1(b). In each instance, the gas is collected to a common point in or relatively near the plant *where processing occurs to make the gas salable* or to recover extractable products or both.

Phillips Petroleum Co., 10 FPC 246, 277 (1951) (emphasis added).

The physical factors of the Commission's primary function test are fully consistent with the Court's recognition in *Northern Natural* that gathering involves "preparing [the gas] for the first stages of distribution." 372 U.S. at 90. As noted by the passage above, prior to processing (to remove extractable products and impurities), the gas is not salable, consumable, or fungible, and therefore is not ready for the "first stages of distribution."[12] Thus, the "distribution" of gas cannot begin until the collection process (including gathering and processing) has been completed. For more that 50 years,

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[12] Despite Petitioners' repeated references to "consumer protection" concerns, the raw, unprocessed gas moved by OCS gathering pipelines is not suitable for sale to consumer markets and indeed no such consumer markets exist on the OCS. Rather, in the restructured natural gas industry, gas prices are set by competitive forces at market "hubs" located well downstream of the production fields and well upstream of the consumers, with participants in the field-area operations (including producers and gatherers) allocating their respective shares of these downstream market-set prices on a "netback" basis. *See Shell Gas Pipeline Co.*, 78 FERC ¶ 61,192, at 61,828-29 (1997) (Santa, Comm'r dissenting).

the Commission has applied its primary function and behind-the-plant tests in scores of cases to identify NGA-exempt gathering both onshore and offshore.

2. While Petitioners focus their anguish on FERC's use of the "central aggregation" factor in reformulating the primary function test in *ExxonMobil* and *Williams*, Petitioners cry largely "crocodile tears." That is because the central aggregation factor was added by FERC to *restrict* the scope of facilities qualifying as NGA-exempt gathering. Specifically, FERC determined that "the 'behind-the-plant' test is not determinative of the gathering question offshore, and that instead it would look at the offshore system's configuration to locate a central point where gas is aggregated for transportation onshore." *Williams*, 331 F.3d at 1014. Thus, FERC used the central aggregation factor in the orders underlying *ExxonMobil* and *Williams* to establish jurisdictional demarcation points well *upstream* of the onshore processing plants, thereby denying the requests of Sea Robin and Transco for nonjurisdictional treatment for *all* facilities upstream of (*i.e.*, "behind") the processing plants. *Id. See also, Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,118, at 61,458-60 (2001); *Transcontinental Gas Pipe Line Corp.*, 96 FERC ¶ 61,246, at 61,976-77 (2001).

The Petitioners' position that the offshore production platforms should serve as the jurisdictional demarcation, which would have resulted in the entirety of Transco's and Sea Robin's OCS facilities being classified as NGA-jurisdictional transportation, has been consistently rejected by the courts. *See EP Operating Co. v. FERC*, 876 F.2d 46, 49 (5th Cir. 1989) (reversing FERC's assertion of jurisdiction over the entirety of an OCS gathering system and rejecting FERC's finding that "the floating [production] platform would be the central point in the field."); *ExxonMobil*, 297 F.3d at 1085 ("This same decision [*EP Operating*] weighs against FERC's treating the production platforms as central

aggregation points as well."); *Sea Robin*, 127 F.3d at 367 (vacating and remanding FERC's assertion of jurisdiction over the entirety of Sea Robin's OCS system which has its upstream termini at the OCS production platforms). The Petitioners' jurisdictional test has never been upheld by a court, and its adoption would overturn more than 50 years of established precedent regarding the primary function test.

The cases cited by Petitioners fail to support their position. For example, *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954), and *Hughes Brothers Timber Co. v. Minnesota*, 272 U.S. 469 (1926), concerned the lawfulness under the Commerce Clause of certain state taxes, which turned on determining where the local activity of gathering ceased and interstate commerce commenced. However, as discussed above, in exempting production and gathering from the NGA, Congress "'did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act.'" *Northwest Central*, 489 U.S. at 510 (quoting *Panhandle*, 337 U.S. at 502-503). Thus, the scope of NGA-exempt gathering is not limited by the full constitutional breadth of interstate commerce. In any event, in *Michigan-Wisconsin*, the tax was levied on "the taking of gas from the outlet of an independent gasoline plant" (347 U.S. at 161), which the Court found unlawful because "the State has delayed the incidence of the tax beyond the step where ***production and processing have ceased*** and transmission in interstate commerce has begun." *Id.* at 167 (emphasis added). Thus, *Michigan-Wisconsin* is fully consistent with the "behind-the-plant" test for gathering, under which NGA-exempt gathering continues until after processing of the gas has been completed.[13]

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[13] The other cases relied on by Petitioners (Petition No. 03-431 at 15-18) are likewise readily distinguishable as cases turning on the express grant of power in the NGA over sales for resale. *Exxon Corp. v.*

3. Finally, the erroneous nature of Petitioners' restrictive interpretation of NGA section 1(b) is further demonstrated by the fact that gathering commonly occurs in very large pipeline networks that extend *across state borders* and undeniably operate in interstate commerce. In fact, the gathering systems involved in *Phillips* consisted of "nine such networks of pipelines" of which "five are located entirely in Texas, one in Oklahoma, one in New Mexico, and *two extend into both Texas and Oklahoma*." *Phillips*, 347 U.S. at 675 (emphasis added). In this regard, "the fact that the subject pipeline facility crosses . . . state borders neither affects the NGA Section 1(b) [gathering] exemption nor precludes classification of the facilities in question as gathering." *Sid Richardson Energy Servs., Ltd.*, 104 FERC ¶ 61,024, at P 12 (2003). *See also*, *Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,191, at 61,769 (1998); *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,045, at 61,7211, n.22 (1997); *The Superior Oil Co.*, 13 FERC ¶ 61,218, at 61,497 (1980).[14]

Eagerton, 462 U.S. 176, 184 (1983) merely recognized that the NGA preempted state regulation of "wholesale sales of natural gas in interstate commerce," but says nothing regarding the scope of NGA-exempt gathering. Similarly, *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 691-93 (1947) ruled that *sales for resale in interstate commerce* are not exempted from federal jurisdiction by the gathering and production exemption, and *Phillips, supra*, 347 U.S. at 684-85, held that the FPC (predecessor to FERC), has authority to regulate rates for such *sales for resale in interstate commerce* made by an independent gathering company.

[14] Likewise, a number of Circuit decisions have recognized that NGA-exempt gathering can occur in large pipeline systems operating in interstate commerce. *See e.g.*, *Pacific Gas & Electric*, 106 F.3d at 1193 (affirming the Commission's relinquishment of NGA jurisdiction over twenty-nine gathering facilities in New Mexico, Colorado, Oklahoma, and Texas); *Northwest Pipeline*, 905 F.2d at 1404 (overturning FERC's assertion of jurisdiction over six gathering facilities in Colorado and Utah); *Conoco*, 90 F.3d at 541-50 (affirming FERC's relinquishment of jurisdiction over gathering facilities located at 105 sites in Arkansas,

D. NGA Abandonment Requirements Do Not Apply To NGA-Exempt Gathering Facilities.

Petitioners erroneously claim that FERC was required to conduct a public-interest "abandonment" analysis under NGA section 7(b) with respect to facilities found to be NGA-exempt gathering. In *Panhandle*, 337 U.S. at 509, this Court, relying on the plain words of the statute, held that the abandonment requirements of NGA section 7(b) apply only to "facilities subject to the jurisdiction of the Commission," and not to "gathering" facilities exempt from the NGA under section 1(b). The Court there rejected arguments of the Federal Power Commission (now FERC) that otherwise exempt production or gathering facilities would be subject to section 7(b):

> The argument here is that since natural gas is the "lifeblood" of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result. The argument begs the question. *The section, like those above, covers only "facilities subject to the jurisdiction of the Commission."*
>
> *To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption of powers specifically denied the Commission by the words of the Act . . . .*

Id. at 509 (footnotes omitted) (emphasis added).[15]

Louisiana, Oklahoma, and Texas); and *Lomak*, 206 F.3d at 1195-98 (affirming FERC's relinquishment of jurisdiction over a gathering system located in New York and Pennsylvania).

[15] The abandonment cases cited by Petitioner (Petition No. 03-431 at 25-27) are off point. because they involved the abandonment of *NGA*-

Nor are Petitioners correct in claiming that there is a genuine split in the Circuits on the abandonment issue. In *Williams*, consistent with this Court's precedent cited above, the D.C. Circuit held that "section 7(b) only applies to jurisdictional facilities, and 'do[es] not expand [FERC's] section 1(b) jurisdiction.'" *Williams*, 331 F.3d at 1022 (quoting *ExxonMobil*, 297 F.3d at 1088 (quoting *Conoco*, 90 F.3d at 553)). While apparently unconvinced of any conflict, the D.C. Circuit further stated (*id.*) that "[w]e part company with the Fifth Circuit's opinion in *Pacific Gas & Electric*, 106 F.3d 1190, ***to the extent that*** it holds that FERC has discretion to examine whether abandonment [of exempt gathering facilities] would be in the public interest" (emphasis added). However, the Fifth Circuit was not called on to decide that same abandonment issue. That issue was not presented in *Pacific Gas & Electric* because the pipeline there sought abandonment authority from FERC (albeit unnecessarily), FERC nonetheless granted the abandonment, and the Fifth Circuit ruled that any need to address the public convenience and necessity had been satisfied. *Pacific Gas & Electric*, 106 F.3d at 1197.

The issue presented in *Pacific Gas & Electric* was "whether the Natural Gas Act supplies [FERC] with jurisdiction over [NGA-exempt] gathering facilities operated by a corporation that is wholly-owned by an [NGA-jurisdictional] interstate natural gas pipeline company." *Id.* at 1193. Regarding that jurisdictional issue, the Fifth Circuit *followed the D.C. Circuit's lead*, citing the D.C. Circuit's decision in *Conoco*:

> [T]he *Conoco* court is correct . . . The statute itself states that it does not apply to *gathering* activities.
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> * * *

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jurisdictional sales or transportation services. Thus, those cases do not support the applicability of NGA abandonment requirements to the *NGA-exempt* gathering *facilities* at issue in *Williams*.

> In sum, *we choose to follow the D.C. Circuit's lead* and hold that FERC construed the Natural Gas Act reasonably when it determined that *gatherers are outside of its statutory jurisdiction* even if they are wholly-owned subsidiaries of interstate pipeline companies.

Id. at 1196-97 (emphasis added). The Fifth Circuit's further statements which Petitioners' attempt to portray as a potential conflict (Petition No. 03-431 at 26-27) were merely *dicta*, addressing FERC's response to an argument raised by other parties and, more specifically, what "FERC's response to this argument *curiously suggests*," *i.e.*, a lack of power in the context of abandoning to a "*nonjurisdictional entity*." *Pacific Gas Electric, 106 F.3d at 1197.* (emphasis added). Moreover, the Fifth Circuit found that "*any* error" on FERC's part regarding abandonment authority "was inconsequential." *Id.* Accordingly, as to the jurisdictional issue presented in *Pacific Gas & Electric*, the Fifth Circuit followed the D.C. Circuit, and the Fifth Circuit's further statements in *dicta* present no genuine conflict that would warrant this Court's review.

CONCLUSION

Wherefore, Respondents WGP and Transco respectfully submit that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. AD03-13-000

Application of the Primary
Function Test for Gathering on
The Outer Continental Shelf

NOTICE OF PUBLIC CONFERENCE

(August 14, 2003)

Take notice that on September 23, 2003, the Commission will convene a public conference in the above captioned proceeding. The purpose of the conference will be to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be.

The Commission has considered its offshore gathering policy a number of times in the past decade.[1] Nevertheless, a

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[1] *See generally* Natural Gas Gathering Services Performed by Interstate Pipelines and Interstate Pipeline Affiliates—Issues Related to Rates and Terms and Conditions of Service, Docket No. RM94-4-000, Notice of Public Conference, 65 FERC ¶ 61,136 (1993); Gas Pipeline Facilities and Services on the Outer Continental Shelf—Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act, Docket No. RM96-5-000, Policy Statement, 74 FERC ¶ 61,222 (1996) (1996 Policy Statement); *Chevron U.S.A., Inc. v. FERC*, 193 F. Supp. 2d 54 (D.D.C., January 11, 2002), *appeal pending sub nom.* Williams Companies, *et al. v. FERC*, No. 02-5056 (D.C. Cir.) (appeal of district court ruling on motion that FERC did not have authority under the Outer Continental Shelf Lands Act (OCSLA) to issue regulations requiring gas service providers on the Outer Continental Shelf (OCS)to submit quarterly reports of services provided).

satisfactory definition of gathering under the Natural Gas Act has remained elusive. A clear, consistent approach to off-shore gathering is needed to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function.

Background

A. Evolution of the Primary Function Test

Although section 1(b) of the Natural Gas Act states that the provisions of that act do not apply "to the production or gathering of natural gas," the act itself does not define those terms. The Commission has defined gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." [2] The Supreme Court has added that "production" and "gathering" are terms "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."[3] These definitions have been useful in describing gathering as a concept. Nevertheless, as the courts have recognized, "the line between gathering and transportation is inherently elusive."[4] Attempts to establish a functional test, useful in the

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[2] *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1196 (D.C. Cir 2000), *quoting from* Barnes Transportation Company, 18 FPC at 372 (1957). *See also Conoco, Inc. v. FERC*, 90 F.3d 536, 539 n.2 (D.C. Cir. 1996)("Gathering is the process of taking natural gas from the wells and moving it to a collection point for further movement through the pipeline's principal transmission system.") (quoting *Northwest Pipeline Corp. v. FERC*, 905 F.2d 1403, 1404 n. (10th Cir. 1990)).

[3] *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90 (1963).

[4] *Exxon Mobil Gas Marketing Company v. FERC (Exxon)*, No. 00-1355 (D.C. Cir. August 6, 2002) (Judge Edwards dissenting) slip op. at 18, citing *Conoco, Inc. v. FERC* 90 F. 3d 536 at 542 (D.C. Cir. 1996).

context of specific proceedings, resemble the pursuit of a desert mirage. Historically, the tendency has been to announce a particular physical characteristic that could be used to identify nonjurisdictional gathering, only to substitute other criteria later to reflect changes in the industry or in the evolution of Commission policy.[5] In *Farmland Industries, Inc.*,[6] the Commission identified a number of factors for consideration in analyzing the section 1(b) gathering test, and stated that "the ultimate test is whether the primary function can be classified as transportation or gathering." The primary function test factors included:

- the length and diameter of a pipeline (longer and wider pipe indicating transportation);
- the central point in a field;

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[5] For many years, the Commission employed two principal tests to differentiate (primarily onshore) transportation from gathering facilities. The "behind-the-plant" test presumes that all facilities located between the wellhead and a processing plant are non-jurisdictional gathering lines, while facilities downstream of the processing plant are presumptively transportation facilities. *See Phillips Petroleum Co.*, 10 FPC 246 (1951), *rev'd in part on other grounds sub nom. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). For gas that required no processing, the "central-point-in-the-field" test applied, under which lateral lines that collect gas from separate wells before converging into a larger single line —typically at the point where the gas is compressed for transportation by the pipeline—were classified as gathering facilities. *E.g.*, Barnes, *supra*.

[6] 23 FERC ¶ 61,063 at 61,143 (1983). The Commission later added a number of "non-physical" criteria, including (1) the purpose, location and operation of a facility; (2) the business of the owner; (3) whether the jurisdictional determination is consistent with the objectives of the NGA and other legislation; and (4) the changing technical and geographic nature of exploration and production. *Amerada Hess Corp.*, 52 FERC ¶ 61,268 at 61,844-45 (1990). Under the primary function test, no one factor is determinative, nor do all factors apply in every situation. *See, e.g., Williams Field Services*, 194 F.3d at 116; *Farmland*, 23 FERC at 61,143.

- the pipeline's geographic configuration (a web-like pattern, for example, suggesting a gathering function)
- location of compressors and processing plants (i.e., the "behind the plant" test);
- the location of wells along all or part of the facilities (typically indicating gathering); and
- operating pressure of a line, with higher pressure generally associated with the need to propel gas in a transportation function

The primary function test has been relatively satisfactory for analyzing onshore facilities. Offshore, however, the test has proven more difficult to apply.[7] Thus, in *EP Operating Co. v. FERC*, 876 F.2d 46, 48-49 (5th Cir. 1989), the Commission initially ruled that under the primary function test the offshore platform where initial gas treatment took place constituted a "central point in the field" where the gathering function was complete, and therefore the 51-mile long, 16-inch diameter OCS pipeline downstream of the platform at issue in that case was a jurisdictional transportation facility. The court reversed that finding, holding that while the length and diameter of pipeline facilities might indicate a transportation function onshore, those factors had less weight in the offshore context because of the longer distances between the point of production in deep water and the nearest

[7] As more new facilities were constructed offshore on the OCS, where the pattern of gathering and distribution differs, the applicability of the factors was questioned. Specifically, it is often not feasible to process raw gas on open water. As a result, pipelines on the OCS typically do not gather gas at a local, centralized point within a producing field as they would onshore, to prepare it for traditional transportation. Rather, on the OCS, they construct relatively long lines to carry the raw gas from offshore platforms, where after production only rudimentary gas treatment takes place (primarily to remove water), to the shore or a point closer to shore where it can be processed into "pipeline quality" gas that can be transported by an interstate pipeline.

connection with an interstate pipeline. The court further questioned the validity of a central-point-in-the-field analysis applied to unitary OCS structures.

In response, the Commission modified its primary function test for the OCS, stating that as drilling operations pushed further offshore from existing interstate pipeline connections, it would apply a sliding scale to allow for the increasing length and diameter appropriate for gathering lines in correlation to the distance from shore and the water depth of the offshore production area. [8] Later, following a conference on offshore gathering in Docket No. RM96-5-000, the Commission issued a policy statement announcing that it would "presume facilities located in deep water [more than 200 meters] are primarily engaged in gathering or production."[9]

As with onshore facilities, the use of the primary function test, as modified by the policy statement for deepwater facilities, seems to be workable, and there has been relatively little controversy concerning its application in recent years. Efforts to apply the primary function test to offshore facilities in the shallow OCS, however, have been contentious.

B. The Sea Robin Pipeline

Difficulties applying the primary function test to offshore facilities were highlighted by the Commission's decision in *Sea Robin Pipeline Company* (*Sea Robin*). [10] Sea Robin's offshore pipeline facilities were certificated as jurisdictional transmission facilities by the Commission in 1969. The system consists of 438 miles of pipeline that transports unprocessed gas from shallow water on the OCS to a processing plant onshore. The system is configured in the form of a "Y". Along the two arms of the "Y", 45 lateral

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[8] *See Amerada Hess*, 52 FERC at 61,988 (1990).

[9] *See* 1996 Policy Statement, note 1 supra.

[10] 71 FERC ¶61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996).

lines with diameters ranging from 4.5 to 30 inches are connected to 67 receipt points located on production platforms, or at subsea taps. Through those upstream arms, Sea Robin moves the gas to a manned platform with two turbine compressor units at the fork of the "Y" closer to shore. The bottom line of the "Y", from the platform to shore, consists of 66.3 miles of 36-inch pipeline. Along this segment the gas is mingled with additional gas from four platforms.

In response to a request to reclassify the Sea Robin facilities from transmission to gathering, the Commission found that the primary function of Sea Robin's entire system was and continued to be jurisdictional transportation. In reaching that conclusion, the Commission emphasized the length and size of Sea Robin's pipeline, and also certain non-physical factors, such as the reliance of shippers in the original jurisdictional determination. The U.S. Court of Appeals for the Fifth Circuit remanded that decision.[11] In doing so the court said the Commission had relied too heavily on the size of Sea Robin's system as a determinative factor and did not give enough consideration to the different nature of gathering on the OCS. The court also faulted the Commission for reliance on non-physical considerations, such as Sea Robin's ownership and shipper expectations. The court specifically found that the Commission's consideration of a "regulatory gap" in the absence of Natural Gas Act jurisdiction was inappropriate: "Need for regulation cannot alone create authority to regulate." [12]

In its decision, the court suggested that the primary function test could be adapted to the operational characteristics of the OCS, so that portions of its system could be considered to be predominantly gathering and other parts predominantly transportation. On remand, then, the Commission adopted this

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[11] *Sea Robin Pipeline Company v. FERC*, 127 F.3d 365 (5th Cir. 1997).

[12] *Id.*at 371.

suggestion and reformulated the primary function test to draw the jurisdictional line at an internal point on the Sea Robin system, at the junction of the "Y".[13] The Commission concluded that the part of Sea Robin's pipeline facilities from the platform to shore was a jurisdictional transportation system. Upstream of that point the two legs of the "Y" formed a non-jurisdictional gathering system.

In reformulating its primary function test, the Commission concluded that the "behind-the-plant" factor is not necessarily determinative of where gathering ends when applied to offshore facilities. In addition, the Commission announced that

> where a pipeline system includes a facility where gas is delivered by several relatively small diameter lines for aggregation and preparation for further delivery onshore through a single larger diameter pipeline, the location of that collection facility will be afforded considerable weight for purposes of identifying the demarcation point between gathering and transportation on OCS systems.[14]

Although not all OCS pipeline systems exhibit such a centralized aggregation point, e.g., facilities with a straight-line or spine-and-lateral type configuration, the presence of such a location would be considered the offshore analogue of the onshore "central-point-in-the-field" criterion.

The Commission's decision on remand, based on its reformulated test that included the central point of aggregation as a factor offshore, was upheld by the U.S. Court of Appeals for the District of Columbia Circuit in *Exxon* (note 4 *supra*).[15]

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[13] *Sea Robin Pipeline Company, Order on Remand*, 87 FERC ¶ 61,384 (1999) (Comm. Bailey dissenting), *rehearing denied*, 92 FERC ¶ 61,072 (2000).

[14] 87 FERC at 62,248.

[15] *See also Williams Gas Processing - Gulf Coast Company, L.P. et al. v. FERC*, No. 01-1327 (D.C. Cir. June 20, 2003).

C. The "Reformulated, Modified Primary Function Test"

Despite the several modifications of the primary function test described above, its utility in identifying nonjurisdictional gathering facilities remains uneven. As mentioned, the rule seems to work fairly well onshore, possibly because where other factors are not conclusive, there is usually a processing plant located at the end of a gathering system that serves as a logical demarcation point between jurisdictional and non-jurisdictional systems. Also, after an initial round of decisions interpreting the 1996 Policy Statement applying the primary function test to facilities located in deep water beyond the OCS, there has been relatively little controversy. In the shallow areas on the OCS, on the other hand, the status of facilities remains unsettled. The Commission continues to receive requests to reclassify jurisdictional transmission facilities as gathering, over the objection of customers who have been served through the facilities. In these types of cases, the correct interpretation of the primary function test is usually the main issue.

Based on the number of contested cases presented to us, we are concerned about the high degree of uncertainty that seems built into the primary function test as applied offshore. The primary function test lists numerous factors for consideration, with no one factor having priority. Thus, for example, the size of a particular system may suggest that it is transmission, but the configuration may suggest gathering. The primary function test does not indicate how such inconsistencies should be resolved. The result, over time, has been the gradual reclassification of more and larger systems as gathering, even in cases where systems had been regulated for many years under the Natural Gas Act. Systems with generally similar physical characteristic may have a different regulatory status because of relatively minor physical differences. This result can produce different regulatory results for competitors who perform essentially the same economic

function. It is also seems unfair to customers who may have made investments relying on the regulated status of a transporter, only to find themselves subject to the market power of that transporter in its new deregulated form. The "need for regulation" may not create authority to regulate; on the other hand, inconsistent classification and regulatory treatment cannot be what Congress intended when it established a comprehensive scheme of federal regulation that included transportation from the OCS.

Public Conference

The Commission is convening a public conference to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the regulatory goals of the Natural Gas Act. (The conference will not include the policy adopted for deepwater facilities in Docket No. RM96-5-000.) A new test should ensure that similar facilities are subject to similar regulatory treatment. It should also provide incentives for investment in production, gathering, and transportation infrastructure offshore, without subjecting producers to the unregulated market power of third party transporters. Persons who appear at the conference should be prepared to indicate how the Commission's definition of gathering can be changed to achieve these goals. Persons seeking to make formal statements at the public conference should be prepared to address questions set forth below. Other questions may arise during the course of the proceedings.

Questions

1. To what extent should a gathering test that be based on the length and diameter of the pipeline, the extent the facilities are operationally integrated with either production or transportation facilities, the function of compression in relation to the facilities, and the proximity to the pipeline transportation grid?

2. To what extent should the location of processing plants, the central point of aggregation, the operating pressure of a line, and geographic configuration of facilities, be considered relevant in evaluating the status of facilities on the OCS? What are the advantages and disadvantages of relying on these factors? Are there any other factors that should be considered?

3. What should be the relevance of non physical factors such as a facility's history of regulation or the major business purpose of an owner?

4. If formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under section 7(b) of the Natural Gas act before the facilities may be transferred to another company?

Procedures

The public conference convened by this notice will be held on September 23, 2003 at the offices of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. All interested persons are invited to attend. Persons interested in speaking or making a presentation should indicate their interest no later than September 3, 2003 by a letter addressed to the Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and should refer to Docket No. AD03-13-000. Each request to participate must include the name of a contact person, their telephone number and e-mail address. There is no need to provide advance notice to the Commission simply to attend the conference.

Comments addressing the questions set out in this notice may also be filed by September 3, 2003. Every effort will be made to accommodate requests to make presentations, but depending on the number of requests received, a limit may

have to be placed on the number of presenters and the time allowed for presentations.

Members of the Commission intend to participate in the public conference and will reserve time for questions and answers. In a subsequent notice, we will provide further details on the conference, including the agenda and a list of participants, as plans evolve. For additional information, please contact Gordon Wagner, Office of General Counsel, phone 202-502-8947, e-mail: gordon.wagner@ferc.gov.

Magalie R. Salas
Secretary

APPENDIX B

Excerpts from Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.*

43 U.S.C. § 1332 (2003)

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act;

(2) this Act shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 8(g) [43 U.S.C. § 1337(g)], will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf[.;]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1334 (2003)

§ 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations.

The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this Act. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

> **(1)** for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for

use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or

permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before the date of enactment of this subparagraph [enacted Sept. 18, 1978], such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C.§ 7401 *et seq.*), to the extent that activities authorized under this Act significantly affect the air quality of any State.

(b) Compliance with regulations as condition for issuance, continuation, assignment, or other transfer of leases.

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this Act shall be conditioned upon compliance with regulations issued under this Act.

(c) Cancellation of nonproducing lease.

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this Act, or of the lease, or of the regulations issued under this Act, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this Act, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease.

Whenever the owner of any producting lease fails to comply with any of the provisions of this Act, of the lease, or of the regulations issued under this Act, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this Act.

(e) Pipeline rights of way; forfeiture of grant.

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 21(b) of this Act [43 U.S.C. § 1347(b)]) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of this Act.

(f) Competitive principles governing pipeline operation.

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles:

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production.

(1) The leasee [lessee] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and economic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes.

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas.

After the date of enactment of this section [enacted Sept. 18, 1978], no holder of any oil and gas lease issued or maintained pursuant to this Act shall be permitted to flare natural gas from any well unless the Secretary finds that there

is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas.

(1) Findings. [(A)] The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects. The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

43 U.S.C. § 1349 (2003)

§ 1349. Citizens suits, jurisdiction and judicial review

(a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security.

(1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act against any person, including the United States, and any other government instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this Act or any regulation promulgated under this Act, or of the terms of any permit or lease issued by the Secretary under this Act.

(2) Except as provided in paragraph (3) of this subsection, no action may be commenced under subsection (a)(1) of this section—

> **(A)** prior to sixty days after the plaintiff has given notice of the alleged violation, in writing under oath, to the Secretary and any other appropriate Federal official, to the State in which the violation allegedly occurred or is occurring, and to any alleged violator; or
>
> **(B)** if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States or a State with respect to such matter, but in any such action in a court of the United States any person having a legal interest which is or may be adversely affected may intervene as a matter of right.

(3) An action may be brought under this subsection immediately after notification of the alleged violation in any case in which the alleged violation constitutes an imminent threat to the public health or safety or would immediately affect a legal interest of the plaintiff.

(4) In any action commenced pursuant to this section, the Attorney General, upon the request of the Secretary or any other appropriate Federal official, may intervene as a matter of right.

(5) A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in a sufficient amount to compensate for any loss or damage suffered, in accordance with the Federal Rules of Civil Procedure.

(6) Except as provided in subsection (c) of this section, all suits challenging actions or decisions allegedly in violation of, or seeking enforcement of, the provisions of this Act, or any regulation promulgated under this Act, or the terms of any permit or lease issued by the Secretary under this Act, shall be undertaken in accordance with the procedures described in this subsection. Nothing in this section shall restrict any right which any person or class of persons may have under any other Act or common law to seek appropriate relief.

(b) Jurisdiction and venue of actions.

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this Act. Proceedings with respect to any such

case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

(c) Review of Secretary's approval of leasing program; review of approval, modification or disapproval of exploration or production plan; persons who may seek review; scope of review; certiorari to Supreme Court.

(1) Any action of the Secretary to approve a leasing program pursuant to section 18 [43 U.S.C. § 1344] of this Act shall be subject to judicial review only in the United States Court of Appeal [Appeals] for the District of Columbia.

(2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this Act shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located.

(3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.

(4) Any action of the Secretary specified in paragraph (1) or (2) shall only be subject to review pursuant to the provisions of this subsection, and shall be specifically excluded from citizen suits which are permitted pursuant to subsection (a) of this section.

(5) The Secretary shall file in the appropriate court the record of any public hearings required by this Act and any additional information upon which the Secretary based his decision, as required by section 2112 of title 28, United States Code. Specific objections to the action of the Secretary shall be considered by the court only if the issues upon which such objections are based have been submitted to the Secretary during the administrative proceedings related to the actions involved.

(6) The court of appeals conducting a proceeding pursuant to this subsection shall consider the matter under review solely on the record made before the Secretary. The findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary for such further action as it may direct.

(7) Upon the filing of the record with the court, pursuant to paragraph (5), the jurisdiction of the court shall be exclusive and its judgment shall be final, except that such judgment shall be subject to review by the Supreme Court of the United States upon writ of certiorari.

(d) [Repealed]

43 U.S.C. § 1350 (2003)

§ 1350. Remedies and procedures

(a) Injunctions, restraining orders, etc.

At the request of the Secretary, the Secretary of the Army, or the Secretary of the Department in which the Coast Guard is operating, the Attorney General or a United States attorney shall institute a civil action in the district court of the United States for the district in which the affected operation is located for a temporary restraining order, injunction, or other appropriate remedy to enforce any provision of this Act, any regulation or order issued under this Act, or any term of a lease, license, or permit issued pursuant to this Act.

(b) Civil penalties; hearing.

(1) Except as provided in paragraph (2), if any person fails to comply with any provision of this Act, or any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under this Act, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than $ 20,000 for each day of the continuance of such failure. The Secretary may assess, collect, and compromise any such penalty. No penalty shall be assessed until the person charged with a violation has been given an opportunity for a hearing. The Secretary shall, by regulation at least every 3 years, adjust the penalty specified in this paragraph to reflect any increases in the Consumer Price Index (all items, United States city average) as prepared by the Department of Labor.

(2) If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the

marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.

(c) Criminal penalties.

Any person who knowingly and willfully (1) violates any provision of this Act, any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under the authority of this Act designed to protect health, safety, or the environment or conserve natural resources, (2) makes any false statement, representation, or certification in any application, record, report, or other document filed or required to be maintained under this Act, (3) falsifies, tampers with, or renders inaccurate any monitoring device or method of record required to be maintained under this Act, or (4) reveals any data or information required to be kept confidential by this Act shall, upon conviction, be punished by a fine of not more than $ 100,000, or by imprisonment for not more than ten years, or both. Each day that a violation under clause (1) of this subsection continues, or each day that any monitoring device or data recorder remains inoperative or inaccurate because of any activity described in clause (3) of this subsection, shall constitute a separate violation.

(d) Liability of corporate officers and agents for violations by corporation.

Whenever a corporation or other entity is subject to prosecution under subsection (c) of this section, any officer or agent of such corporation or entity who knowingly and willfully authorized, ordered, or carried out the proscribed activity shall be subject to the same fines or imprisonment, or both, as provided for under subsection (c) of this section.

(e) Concurrent and cumulative nature of penalties.

The remedies and penalties prescribed in this Act shall be concurrent and cumulative and the exercise of one shall not preclude the exercise of the others. Further, the remedies and

penalties prescribed in this Act shall be in addition to any other remedies and penalties afforded by any other law or regulation.

43 U.S.C. § 1801 (2003)

§ 1801. Congressional findings

The Congress finds and declares that—

(1) the demand for energy in the United States is increasing and will continue to increase for the foreseeable future;

(2) domestic production of oil and gas has declined in recent years;

(3) the United States has become increasingly dependent upon imports of oil from foreign nations to meet domestic energy demand;

(4) increasing reliance on imported oil is not inevitable, but is rather subject to significant reduction by increasing the development of domestic sources of energy supply;

(5) consumption of natural gas in the United States has greatly exceeded additions to domestic reserves in recent years;

(6) technology is or can be made available which will allow significantly increased domestic production of oil and gas without undue harm or damage to the environment;

(7) the Outer Continental Shelf contains significant quantities of oil and natural gas and is a vital national resource reserve which must be carefully managed so as to realize fair value, to preserve and maintain competition, and to reflect the public interest;

(8) there presently exists a variety of technological, economic, environmental, administrative, and legal problems which tend to retard the development of the oil and natural gas reserves of the Outer Continental Shelf;

(9) environmental and safety regulations relating to activities on the Outer Continental Shelf should be reviewed in light of current technology and information;

(10) the development, processing, and distribution of the oil and gas resources of the Outer Continental Shelf, and the siting of related energy facilities, may cause adverse impacts on various States and local governments;

(11) policies, plans, and programs developed by States and local governments in response to activities on the Outer Continental Shelf cannot anticipate and ameliorate such adverse impacts unless such States, working in close cooperation with affected local governments, are provided with timely access to information regarding activities on the Outer Continental Shelf and an opportunity to review and comment on decisions relating to such activities;

(12) funds must be made available to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interests caused by such spills or discharges;

(13) because of the possible conflicts between exploitation of the oil and gas resources in the Outer Continental Shelf and other uses of the marine environment, including fish and shellfish growth and recovery, and recreational activity, the Federal Government must assume responsibility for the minimization or elimination of any conflict associated with such exploitation;

(14) the oil and gas resources of the Outer Continental Shelf are limited, nonrenewable resources which must be developed in a manner which takes into consideration the Nation's long-range energy needs and also assures adequate protection of the renewable resources of the Outer Continental Shelf which are a continuing and increasingly important source of food and protein to the Nation and the world; and

(15) funds must be made available to pay for damage to commercial fishing vessels and gear resulting from activities involving oil and gas exploration, development, and production on the Outer Continental Shelf.

43 U.S.C. § 1802 (2003)

§ 1802. Congressional declaration of purposes

The purposes of this Act are to—

(1) establish policies and procedures for managing the oil and natural gas resources of the Outer Continental Shelf which are intended to result in expedited exploration and development of the Outer Continental Shelf in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade;

(2) preserve, protect, and develop oil and natural gas resources in the Outer Continental Shelf in a manner which is consistent with the need (A) to make such resources available to meet the Nation's energy needs as rapidly as possible, (B) to balance orderly energy resource development with protection of the human, marine, and coastal environments, (C) to insure the public a fair and equitable return on the resources of the Outer Continental Shelf, and (D) to preserve and maintain free enterprise competition;

(3) encourage development of new and improved technology for energy resource production which will eliminate or minimize risk of damage to the human, marine, and coastal environments;

(4) provide States, and through States, local governments, which are impacted by Outer Continental Shelf oil and gas exploration, development, and production with comprehensive assistance in order to anticipate and plan for such impact, and thereby to assure adequate protection of the human environment;

(5) assure that States, and through States, local governments, have timely access to information regarding activities on the Outer Continental Shelf, and opportunity to review and comment on decisions relating to such activities, in order to anticipate, ameliorate, and plan for the impacts of such activities;

(6) assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf;

(7) minimize or eliminate conflicts between the exploration, development, and production of oil and natural gas, and the recovery of other resources such as fish and shellfish;

(8) establish an oilspill liability fund to pay for the prompt removal of any oil spilled or discharged as a result of activities on the Outer Continental Shelf and for any damages to public or private interest caused by such spills or discharges;

(9) insure that the extent of oil and natural gas resources of the Outer Continental Shelf is assessed at the earliest practicable time; and

(10) establish a fishermen's contingency fund to pay for damages to commercial fishing vessels and gear due to Outer Continental Shelf activities.

Supreme Court, U.S.
FILED
DEC 16 2003

No. 03-431

IN THE

Supreme Court of the United States

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF

In this case, the D.C. Circuit upheld[1] decisions of the Federal Energy Regulatory Commission ("FERC") that cannot be reconciled with FERC's statutory responsibilities under Section 1(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b), to regulate the terms and conditions of service imposed by pipeline monopolies on the offshore Outer Continental Shelf ("OCS"). The D.C. Circuit approved FERC's determination that the extensive pipeline systems at issue could be reclassified as non-jurisdictional gathering and abandoned without the findings required by Section 7(b) of the NGA that the public convenience or necessity permits the abandonment. 15 U.S.C. § 717f(b). The D.C. Circuit's holding is unlawful under the limited scope of the Section 1(b) gathering exemption established by *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 89-90 (1963) ("*Northern Natural*"). It also is at odds with decisions of this Court providing that once facilities are certificated they are dedicated to interstate service and may be abandoned pursuant to Section 7(b) only upon a finding that the "public convenience or necessity permit such abandonment." *See Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 141-42, 156 (1960) ("*Sunray*"). The D.C. Circuit's abandonment holding also directly conflicts with the Fifth Circuit's holding in *Pacific Gas & Electric Co. v. FERC*, 106 F.3d 1190, 1197 (5th Cir. 1997) ("*Pacific Gas & Electric*").

As explained in the Petition,[2] in contrast to *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002) ("*ExxonMobil*"), *cert. denied*, 124 S. Ct. 47 (2003), this case squarely involves the propriety of a pipeline's abandonment

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[1] *Williams Gas Processing—Gulf Coast Co. v. FERC*, 331 F.3d 1011 (D.C. Cir. 2003) ("*Williams*").

[2] Petition for Writ of Certiorari, *Shell Offshore, Inc. v. FERC*, (No. 03-431), filed Sep. 15, 2003 ("Pet.") at 30.

of certificated gathering facilities and services and the resultant termination of FERC's rate jurisdiction. For that reason, this case is an appropriate vehicle to determine whether the explicit requirements of Section 7(b) must be met when a pipeline seeks to abandon reclassified gathering facilities and services that had been previously certificated and dedicated to interstate service.

1. FERC's Most Recent Indication That It *May* Reconsider Its OCS Gathering Policy Does Not Warrant Denial of the Petitions.

a. The FERC Conference Only Reinforces The Need For Court Review.

Respondents argue[3] that this Court should deny review because, subsequent to the decision below, FERC convened a public conference "to explore whether the Commission should reformulate its test for defining non-jurisdictional gathering in the shallow waters of the Outer Continental Shelf (OCS) and if so what the new test should be." Notice of Public Conference, *Application of the Primary Function Test for Gathering on The Outer Continental Shelf*, FERC Docket No. AD03-13-000, issued Aug. 14, 2003 ("Notice"), Williams Opp'n App. at 1a. Contrary to Respondents' contention that the Court should deny the Petition to allow FERC to reconsider these matters, the FERC conference only reinforces the need for this Court's review.

After acknowledging that this is FERC's *fourth* review of its gathering policy, the Notice all but admits that FERC's current policy is unworkable and undermines needed cer-

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[3] Brief of Respondents Williams Gas Processing-Gulf Coast Company, L.P., and Transcontinental Gas Pipe Line Corporation in Opposition, *Producer Coalition v. FERC* (Nos. 03-147 and 03-431), filed Dec. 1, 2003 ("Williams Opp'n"); Brief for the Federal Energy Regulatory Commission in Opposition, *Producer Coalition v. FERC* (Nos. 03-147 and 03-431), filed Dec. 1, 2003 ("FERC Opp'n").

tainty and reliability in the regulatory scheme. *See, e.g.*, Williams Opp'n App. at 1a. ("a satisfactory definition of gathering under the Natural Gas Act has remained elusive."); Williams Opp'n App. at 9a. (result of current test "seems unfair to customers who may have made investments relying on the regulated status of the transporter, only to find themselves subject to the market power of that transporter in its new deregulated form.").

Further, FERC's Notice reflects the agency's continuing misapprehension that the scope of its jurisdiction under NGA Section 1(b) and its obligations to protect the public interest under NGA Section 7(b) are simply "policy issues" to be resolved in FERC's boundless discretion "in the first instance." FERC Opp'n at 11. To the contrary, FERC is constrained by this Court's interpretation of Sections 1(b) and 7(b). FERC must follow this Court's "longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *California v. FERC*, 495 U.S. 490, 499 (1990). The failure of FERC and the D.C. Circuit to do so here has disrupted "a highly complex and long-enduring regulatory regime, implicating considerable reliance interests . . . ." *Id.* at 500. What is needed at this juncture is not another iteration of FERC's vacillating "policy" choices, but this Court's reaffirmation and application of its precedents to restore the Commission's jurisdiction over the critical pipeline infrastructure and services in the OCS here at issue.

b. The Government's Procedural Gambit Disserves The Industry As Well As FERC Itself.

The government seeks to avoid review in this case based on the mere possibility that FERC will reconsider its positions. However, there is no assurance that FERC will change its position following this conference, nor that any change will comply with *Northern Natural* or other precedents of this Court narrowly construing the NGA gathering

exemption.[4] Moreover, there is no assurance that FERC could effectively undo the abandonment of the facilities and services here at issue even in the event FERC changes its policies as a result of its latest policy review.

Review by this Court at this juncture is crucial given the split between the decision of the D.C. Circuit below and the decision of the Fifth Circuit in *Pacific Gas & Electric*. Regardless of whether FERC changes to the Fifth Circuit's side of the argument, a possibility raised by the Notice (Williams Opp'n App. at 10a), the conflict between the courts of appeal will continue. Until these matters are addressed by this Court, FERC will remain buffeted by the contending legal theories of two courts of appeal as parties aggrieved by a FERC decision on whether to apply the public convenience or necessity standard of Section 7(b) will seek relief from the court of appeals that embraces their side of the issue.[5]

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[4] The government's professed commitment to a genuine reconsideration of its positions is belied by its unequivocal position on the merits before this Court. For example, while the Notice suggests that FERC is considering whether it "may" apply the public convenience or necessity requirements of NGA Section 7(b) before allowing certificated facilities now classified as gathering to be transferred to a non-jurisdictional entity, Williams Opp'n App. at 10a, it takes the opposite view before this Court. In its Brief In Opposition, FERC unequivocally argues that the D.C. Circuit below properly found that FERC has no authority to consider the public interest before granting abandonment of facilities under these circumstances. *See* FERC Opp'n at 14.

[5] The conflict between the two courts of appeal also extends to the courts' views on the discretion held by FERC to distinguish between gathering and transmission under NGA Section 1(b). The D.C. Circuit has concluded in *ExxonMobil* and *Williams* that FERC's discretion is broad, and has revealed no inclination to second-guess FERC's judgment. The Fifth Circuit is not so deferential, revealing in *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997) and *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989) a clear willingness to substitute its judgment for that of FERC.

2. Respondents Have Misstated Petitioners' Jurisdictional Contentions Concerning *Northern Natural* and Other Supreme Court Precedent.

Respondents incorrectly characterize the Shell Offshore Petitioners' argument as the "novel view . . . that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation." FERC Opp'n at 13. Far from asserting such a bright-line test, Shell Offshore Petitioners assert that FERC's reclassification of hundreds of miles of previously certificated transportation pipeline systems as non-jurisdictional gathering facilities is unlawful under this Court's controlling construction of the gathering exemption in Section 1(b) of the NGA. The FERC orders upheld by the D.C. Circuit expand the gathering exemption well beyond the "narrowly confined" facilities needed to draw gas from the earth and prepare it for the "first stages" of distribution envisioned in *Northern Natural*. *See Exxon Mobil*, 297 F.3d at 1093 (Edwards, dissenting) (stating that FERC's determination is "unlawful in light of what we have been told by the Supreme Court in *Northern Natural*"). Properly applying *Northern Natural* may of course confine gathering to facilities "closer to the production platforms," Pet. at 22, but the Shell Offshore Petitioners do not here assert that the offshore production platforms themselves are necessarily synonymous with the demarcation point between gathering and transmission contemplated by *Northern Natural*. Notwithstanding Respondents' suggestions, confirming the failure of the FERC and the D.C. Circuit to properly apply the narrow definitions of gathering set forth in *Northern Natural* does *not* require the Court to undertake a highly technical and fact-bound effort to draw precise lines of demarcation between non-jurisdictional gathering and jurisdictional transportation.

In other transparent efforts to set up "straw-men" positions, Respondents wrongly characterize the Shell Offshore Peti-

tioners' arguments as stating: (1) that a facility may be classified as gathering "only if a State could regulate the activity under the Commerce Clause," such that there can be no gathering facilities on the OCS where State authority does not exist (FERC Opp'n at 13 n.6); and (2) that the Congressional intent in enacting the NGA was to extend federal jurisdiction to the full extent of its authority under the Commerce Clause. FERC Opp'n at 13, n.6; Williams Opp'n at 12. The Shell Offshore Petitioners make neither contention. Rather, their precise position is directly drawn from this Court's precedents: Under the NGA, Congress created a comprehensive regulatory scheme of dual federal and state authority with federal regulation intended to "occupy the field in which the Supreme Court has held that the States may not act." Pet. at 15, *quoting Exxon Corp. v. Eagerton*, 462 U.S. 176, 185 (1983). The Shell Offshore Petitioners do not contend that Congress preempted previously authorized state regulation by extending the jurisdictional reach of the NGA to the full extent of the Commerce Clause. Indeed, Section 1(b) of the NGA expressly preserves state authority over such activities. Further, the fact that states have no authority on the OCS does not expand FERC's authority to gathering facilities and services in the OCS as properly defined under *Northern Natural* and does not mean that there can be no gathering facilities on the OCS. The jurisdictional gap resulting from the absence of both FERC and state authority over gathering facilities on the OCS underscores the need for FERC and the courts to limit the scope of the Section 1(b) gathering exemption in accordance with the precedents of this Court, but the Shell Offshore Petitioners do not argue that the gap itself serves to expand FERC jurisdiction beyond the scope established under the Court's precedent.

Respondent Williams further argues that the Court need not be concerned by producers' reliance on the NGA regulatory regime for protection against pipeline monopoly power because the Outer Continental Shelf Lands Act, 43 U.S.C.

§ 1331, *et seq.*, ("OCSLA") protects all shippers on OCS pipelines from the exercise of unconstrained market power. Williams Opp'n at 9-11. The limited protections provided under OCSLA provide no rationale for leaving undisturbed the failure of FERC and the D.C. Circuit to properly apply this Court's longstanding precedents interpreting Sections 1(b) and 7(b) of the NGA. As the D.C Circuit itself found in *Williams Cos. v. FERC*, 345 F.3d 910, (D.C. Cir. 2003) ("*Williams Cos.*"), OCSLA "do[es] *not* grant FERC general powers to create and enforce open access rules on the OCS . . . ." *Id.* at 916 (emphasis added). In the D.C. Circuit view, Section 1334(f) of OCSLA "simply requires the Secretary of Interior to condition grants of rights-of-way on the holder's agreeing to non-discriminatory transportation duties." *Id.* at 913. Of central importance to the effective regulation of pipeline monopolies in the OCS, OCSLA contains no express prohibitions and enforcement authority comparable to that provided by the NGA that would allow FERC or any other agency to proscribe the exercise of market power by interstate pipelines through the imposition of monopolistic rates, terms and conditions of service. In any event, however OCSLA ultimately may be applied, FERC's obligations to enforce the NGA remains in place, and FERC has no authority to exempt any entity that is subject to FERC's NGA jurisdiction. *See FPC v. Texaco Inc.*, 417 U.S. 380, 394 (1974).

3. *Williams* And *Pacific Gas & Electric* Pose A Square Conflict In The Circuits Concerning The Critical Abandonment Protections Of Section 7(b) Of The NGA.

a. There Is A Conflict Between The Circuits.

Respondents seek to obscure the existence of a direct conflict between the D.C. Circuit's decision in *Williams* and the Fifth Circuit's decision in *Pacific Gas & Electric*. Respondent Williams quibbles with the D.C. Circuit's own characterization of its decision as in conflict with the Fifth

Circuit's holding in *Pacific Gas & Electric* and argues that the Fifth Circuit did not really decide whether "FERC has discretion to examine whether abandonment [of previously certificated gathering facilities] would be in the public interest." Williams Opp'n at 19 (*quoting Williams*, 331 F.3d at 1022.) But the Fifth Circuit in *Pacific Gas & Electric* did address this issue and clearly determined that under Section 7(b) of the NGA FERC may not *allow* an abandonment of previously certificated facilities currently classified as gathering without ensuring that the "future public convenience or necessity permits such abandonment." *Pacific Gas & Electric*, 106 F.3d at 1197. The D.C. Circuit in *Williams* reached precisely the opposite conclusion, *i.e.* that FERC may not *deny* an abandonment of previously certificated facilities currently classified as gathering because FERC has no authority to even consider whether the public convenience or necessity permits such abandonment. *Williams*, 331 F.3d at 1022.

FERC also claims there is no conflict. FERC in effect argues that *Pacific Gas & Electric* did not involve the abandonment of certificated transportation pipelines *reclassified* from transmission to gathering, but instead concerned the abandonment of certificated facilities *already classified* as gathering facilities. FERC Opp'n at 17. This is a distinction without a difference. At issue in both *Williams* and *Pacific Gas & Electric* is whether the Section 7(b) abandonment requirements apply to gathering facilities certificated pursuant to Section 7(c) of the NGA.[6]

Respondents assert that the D.C. Circuit's interpretation of the abandonment requirements is consistent with the language

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[6] In *Pacific Gas & Electric*, El Paso sought abandonment authority for gathering system facilities that were subject to certificates of public and convenience and that El Paso sought to transfer to a non-jurisdictional affiliate. *See El Paso Natural Gas Co.*, 72 F.E.R.C. (CCH) ¶ 61,220 (1995).

of NGA Section 7(b) and the precedents of this Court. FERC Opp'n at 14 and Williams Opp'n at 18 (citing *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949)). But *Panhandle* simply held that the abandonment requirement did not apply to gas leases that were never certificated and were beyond the FERC's jurisdiction. *Id.* at 509. In contrast, the facilities here at issue were certificated and, therefore, dedicated to interstate service. *See California v. Southland Royalty Co.*, 436 U.S. 519, 525-26 (1978); *Sunray*, 364 U.S. at 156. FERC's NGA Section 7(c) certificate authority governs interstate market entry and its Section 7(b) abandonment authority covers market exit. *See Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 506 (1989). Upon certification, facilities are dedicated to interstate service and thereby "subject to the jurisdiction of the Commission" until the Commission authorizes abandonment under the public convenience or necessity standard of NGA Section 7(b). Thus, contrary to the D.C. Circuit's view, Pet. App. at 19a, reclassification of certificated facilities does not by itself authorize abandonment; instead, FERC may authorize abandonment of such reclassified facilities only upon a finding of the public convenience and necessity. Consistent with the holding in *Pacific Gas & Electric*, but inconsistent with *Williams*, this Court has ruled that NGA Section 7(b) "simply does not admit of *any* exception to the statutory procedure." *See United Gas Pipeline Co. v. McCombs*, 442 U.S. 529, 536 (1978) (emphasis added).

b. FERC's Conclusory Public Interest Findings Do Not Warrant Denial Of The Petition.

While FERC argues that the D.C. Circuit correctly concluded that FERC lacks discretion to deny abandonment of gathering facilities previously certificated as transmission, FERC claims there is no need for this Court's review of the decision because, in the alternative, FERC "found that 'the public convenience and necessity' permitted Transco's re-

quested abandonment and transfer to its affiliate." FERC Opp'n at 14. FERC's conclusory "findings" do not obviate the fundamental conflict between the courts of appeal or otherwise support denial of the Petition.

FERC's public interest "findings" are that abandonment will enhance competition and that shippers will remain protected under the Commission's regulations under OCSLA. FERC Opp'n at 14-16; Pet. App. at 74a-77a. These conclusions are unsupported by record evidence or reasoned analysis. Indeed, they are refuted by FERC's conclusions regarding the adverse impacts of reclassification and abandonment of gathering facilities on the OCS set forth in its 1996 Policy Statement[7] and more recently in its Notice. *See, e.g.*, Williams Opp'n App. at 9a. Further, the reliance of FERC (Pet. App. at 74a-77a) and of the D.C. Circuit (Pet. App. at 19a) on FERC's regulatory regime under OCSLA was plainly misplaced given the recent decision of the D.C. Circuit to vacate FERC's OCSLA regulations. *See Williams Cos.*, 345 F.3d at 916.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition should be granted.

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[7] *Gas Pipeline Facilities and Services on the Outer Continental Shelf-Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, 74 F.E.R.C. (CCH) ¶ 61,222 at 61,752 n.5, 61,756-7 (1996) ("1996 Policy Statement"); *see* Pet. at 27-29.

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